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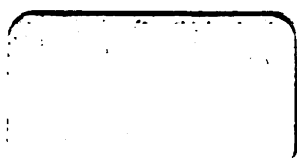
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. I.

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SAN FRANCISCO:

BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1885.

121690

JUL 29 1942

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* From January 1, 1884.

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CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

CHAMBERS v. ATLAS INSURANCE COMPANY.

(51 Conn. 17.)

Insurance — limitation — "loss occurred."

A fire insurance policy provided that losses should be paid in sixty days from receipt of proofs, and that no suit should be maintainable unless brought within twelve months after the loss occurred. *Held*, that the twelve months must be reckoned from the day of the fire. (*See note, p. 3.*)

ACTION on a fire insurance policy. The opinion states the case.
The defendant had judgment below.

E. B. Bennett, for appellants.

C. J. Cole, for appellee.

PARDEE, J. The plaintiff took from the defendant a policy of insurance against loss by fire, to be in force from January 1 to December 31, 1881. On September first of that year the property covered by it was injured by fire. The plaintiffs instituted this suit for the recovery of damages. The defendant demurred and had judgment; the plaintiffs appeal.

The policy contains the following provisions: "Payment of losses shall be due in sixty days after the proofs required by this company

shall have been received at this office and the loss shall have been satisfactorily ascertained and proved as required by the foregoing provisions of this policy. It is furthermore hereby expressly provided that no suit or action of any kind against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against this company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. * * * This policy is made and accepted upon the above express conditions; no part thereof can be waived except in writing signed by the secretary."

Proof of loss was made on September 14, 1881. This suit was instituted on November 11, 1882. It is the claim of the plaintiffs that they may institute their suit within the twelve months next after the expiration of sixty days from proof of loss, that is, next after November 14, 1881. It is the claim of the defendant that they must institute it within the twelve months next after the fire.

This limitation is lawful and reasonable. In words in common use and of plain meaning an event is referred to as a starting point; that is, the destruction of, or injury to, the plaintiff's property by fire. It is certain that they intended to surrender a very large portion of the time allowed them by the law; and there is nothing either in the structure or subject-matter of the contract indicating their unwillingness to make the day of that occurrence the point of departure, and to agree that the period of twelve months therefrom should cover the making of the proofs, the sixty days of grace to the defendant, and the institution of a suit.

The contract keeps the day upon which a fire shall occur entirely distinct from the day upon which the right to sue for indemnity accrues; each is described in plain and appropriate language. We find no reason for the assumption that when the first is mentioned the last is intended; and it is not for us, by construction, to give the plaintiffs what they failed to secure by agreement.

There is no error in the judgment complained of.

Judgment affirmed.

In this opinion the other judges concurred.

Raymond v. Fish.

NOTE BY THE REPORTER.—See 37 Am. Rep. 800; 42 Am. Rep. 297; *Farmers' Mut., etc., Ins. Co. v. Barr*, 94 Penn. St. 845. In *Westchester Fire Ins. Co. v. Dodge*, 44 Mich. 420, it was held that "where proofs of loss under an insurance policy are received within a reasonable time before the expiration of the period fixed by the policy for bringing suit against it, the company cannot cut off the right to sue by withholding its decision upon the proofs until that period has expired, even though the time allowed for examining the proofs would have consumed it." In *Tusker v. Insurance Co.*, 58 N. H. 469, it was held that a "clause in the policy, stipulating that no action shall be sustainable thereon unless commenced within twelve months next after the loss occurs, is in form and effect a condition precedent, and unless it is complied with, there can be no recovery at common law." *Patrick v. Ins. Co.*, 48 N. H. 621, 624; *Gooden v. Ins. Co.*, 20 N. H. 73, 76; *Judkins v. Ins. Co.*, 39 N. H. 172; *Fullam v. Ins. Co.*, 7 Gray, 61; *Roach v. Ins. Co.*, 30 N. Y. 546; *Williams v. Ins. Co.*, 20 Vt. 222; *Wilson v. Ins. Co.*, 27 Vt. 99; *May Ins.*, § 478." See, also, *Merchants' Mut. Ins. Co. v. Lacroix*, 14 Am. Rep. 370; *Handler v. St. Paul, etc., Ins. Co.*, 18 Am. Rep. 385. An adjustment indorsed on the policy renders it unnecessary to bring suit within the time provided in the policy. *Illinois, etc., Ins. Co. v. Archdeacon*, 25 Am. Rep. 313. If new proofs are substituted for others which were defective, the time is reckoned from the delivery of the new proofs. *Kimball v. Hamilton Ins. Co.*, 8 Bosw. 495. Ignorance of such condition will not avail the insured. *De Grove v. Mut. Ins. Co.*, 61 N. Y. 594, 604.

RAYMOND V. FISH.

(61 Conn. 60.)

Board of health — statute — nuisance.

A board of health was empowered to take measures to preserve the public health and prevent malignant diseases, and to examine into nuisances and sources of filth which in their judgment should endanger health. They removed brush with oysters growing on it in a public river. *Held*, (1) that the members of the board were not liable for error of judgment in assuming it to be the source of disease; (2) that they might remove it although it was not filth; (3) that the removal was lawful although not made until after the disease had ceased; (4) and that it made no difference that the board causing the removal was composed of different members from the board ordering it.*

* See *Hutton v. City of Camden* (10 Vroom, 22), 23 Am. Rep. 203.

ACTION of damages for removal of brush with oysters growing on it. Case reserved.

D. Chadwick and A. Brandages, for plaintiff.

J. Halsey and S. Lucas, for defendant.

PARK, C. J. The question in this case turns upon the construction to be given to the first and second sections of the statute with regard to public health and safety (Gen. Statutes, p 258), which provide as follows: "The justices of the peace and selectmen in each town shall constitute a board of healh, and have all the power necessary and proper for preserving the public health and preventing the spread of malignant diseases therein, and may appoint its president and such health officers or health committee as it may deem expedient, and delegate to them any of its powers; and the members present at any meeting convened as the board shall direct shall be a quorum for business. * * * Such board, or such health officers or health committee, shall examine into all nuisances and sources of filth injurious to the public health, and cause to be removed all filth found within the town which in their judgment shall endanger the health of the inhabitants; and all expenses for such removal shall be paid by the person who placed it there, if known, and if not known, by the town; and when any such filth or nuisance shall be found on private property, such board shall notify the owner or occupant of such property to remove the same at his expense, within such time as the board shall direct, and if he shall neglect to remove it he shall be fined not less than \$20 nor exceeding \$100 and pay such expense and costs as the town shall incur by such removal; and after the expiration of such time such board shall cause such filth or nuisance forthwith to be removed or abated; and such board, or such health officer or committee as it shall direct, may enter all places where such board shall have just cause to suspect any such nuisance or causes of filth to exist."

In the month of May, 1881, the small village of Pequonock, in the town of Groton, was sorely afflicted with the contagious diseases of scarlet fever and diphtheria of a malignant character. It is said that one or more members of every household, and in some instances entire families in the village, were prostrated by one or

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the other or both of these diseases. From May till September of that year the sickness raged in the little community, and many deaths, numerous in proportion to the number of inhabitants, occurred. As might well have been expected great alarm and much excitement prevailed in the village and surrounding country, and strenuous efforts were made to discover the cause of the malady. It is a matter of common knowledge that these diseases are supposed to originate in noxious exhalations from decaying animal and vegetable matter, and when once in existence are greatly aggravated by the continuance of the malarious atmosphere. The attention of the board of health of the town of Groton was called to the subject, meetings were held by the board, and examinations were made of Pequonock river and various other places in the vicinity of the village, to discover the cause of the malady.

Pequonock river is an arm of the sea and runs from the village and empties into Long Island sound. It is about three miles long, and through its entire length the tide rises and falls about three feet. It is a sluggish stream and has a thick muddy deposit at the bottom. This river had long been favorably known for the superior quality of its native oysters. They were found only near the shore, as the muddy bottom in the bed of the stream rendered it impossible for them to grow there.

The superior quality of the oysters induced the plaintiff and others to so place brush in the bed of the river that oysters might grow thereon, and thus be kept from the mud at the bottom. This was done in the years 1879 and 1880, and in the early part of 1881, and Pequonock river was filled with the brush, except a space one hundred feet wide in the middle of the river; and at the time sickness prevailed in the village, oysters in all stages of growth were attached to the brush.

The board of health were unable, from their examinations of the river and other places, to determine with certainty what caused the malady, and thereupon requested the assistance of the State board of health. Their secretary made an examination of the river and afterward reported to the town board that the brush in the river with the oysters thereon was a nuisance. The town board afterward, on the 10th day of August, 1881, had another hearing regarding the matter at which the plaintiff and others appeared and was fully heard. At this meeting the board passed the following vote: "That we concur with the State board in their recom-

mendation that the brush be removed as a nuisance." Thereupon the board, by their secretary, gave the plaintiff and others written notice to remove the brush owned by them respectively from the river, specifying a time when they were to begin to do it. The brush was not removed, and on the 8th day of December following the board, with some new members who had been elected in October preceding, again declared by a vote that the brush in the river was a nuisance and injurious to the public health; and again ordered the plaintiff and others to remove the brush owned by them respectively before a specified day; and caused due notice to be given to the owners of the action of the board. The plaintiff was not present at this meeting of the board. He had no notice that it was to be held, and had no knowledge of it till afterward. The brush was not removed by the plaintiff, and the board, by the hands of the defendants, removed and destroyed it with the oysters thereon, doing no unnecessary damage. The case finds that the board acted in good faith throughout the whole transaction.

The case further finds that "neither the brush nor oysters, nor both combined, were the origin or producing cause of the diseases;" but leaves it undetermined "whether they may not have furnished conditions favorable to the spread and continuance of the diseases, and to making them more malignant than they otherwise would have been."

The malady ceased to be epidemic about the 1st of September; and after that time, it is expressly found, that the brush and oysters were not a nuisance.

These are the principal facts of the case, and they make the liability of the defendants depend upon the construction to be given to the statute already cited. The question is, does the statute confer upon the board of health the right to determine conclusively in any case what are nuisances and sources of filth which endanger the health of the inhabitants; so that if they act in good faith, and merely err in judgment, the statute will justify the act done, although the property of a third party may be destroyed? If the statute is to be so construed, then the defendants are not responsible for the damage, whatever it may be, that they have caused the plaintiff. If it is not to be so construed, if boards of health must act at their own peril in cases of emergency, then the defendants are liable, and must respond in damages for all the injury caused by their acts.

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Before coming to this question directly, we should take into consideration the object of this statute, which professes to be enacted for the preservation of the "public health and safety." It is well known that diseases of the most contagious and malignant character are supposed to be caused by poisonous exhalations from decaying animal and vegetable matter. This statute is based upon that fact and was intended to furnish a remedy in cases where such diseases are spreading, and men, women and children are stricken down and dying in consequence of noxious effluvia from decaying matter and filth in the vicinity. In such cases there is absolute necessity for immediate action. There is no time to resort to the courts to determine whether the supposed nuisances are so in fact, and are destroying life and health in the vicinity. During such delay an entire village might become depopulated. What shall be done? Life and health are to be considered on the one side, and what value there may be in nuisances and filth on the other. Life and health are to be preserved at the cost of nuisances and filth. The statute does not mean to destroy property which is not in fact a nuisance, but who shall decide whether it is so? All legal investigations require time, and cannot be thought of. If the board of health are to decide at their peril, they will not decide at all. They have no greater interest in the matter than others, further than to do their duty; but duty, hampered by a liability for damages for errors committed in its discharge, would become a motive of very little power.

It would seem to be absolutely necessary to confer upon some constituted body the power to decide the matter conclusively, and to do it summarily in order to accomplish the object the statute has in view. We think this has been done. We think the board of health of the town of Groton had the power to decide conclusively in the apparent necessities of the case, that the brush in Pequonock river was a nuisance, endangering the life and health of the inhabitants of the village.

If we examine the different sections of the act "for the preservation of the public health and safety," we shall find great powers conferred upon the board of health in regard to other matters than those here in controversy. They may order any vessel into quarantine whenever they deem it expedient for the public safety. They may order any vessel to be cleansed and purified in a certain manner whenever they consider it necessary; and if such vessel shall contain

any person ill with any contagious or infectious disease, they may order such person, and any other person or persons on board, to be secluded for the space of fourteen days, whether such other persons are ill at the time or not. They may interdict communication between different towns or places, whenever any contagious or malignant disease is prevalent in one of them. They may order any person whom they have reasonable ground to believe to be infected with any malignant, infectious or contagious disease, into confinement in any place to be designated by them, there to remain so long as the board shall judge it to be necessary. These powers, and many others that may be found in the statute, have their origin in the urgent necessities of the case. Disease makes its ravages, and it must be met by extraordinary measures, and all persons must submit to what is absolutely necessary to stay its progress. These powers conferred upon the board are as injurious to those upon whom they are exercised as those involved in the present controversy, to say the least. A vessel must go into quarantine at the bidding of the board, no matter how great may be the loss to the owners. A person must go into seclusion for the space of fourteen days, who happens to be found on board a vessel where another is ill with some contagious disease; and if the board have reasonable ground to believe that such person is infected with the same disease; he must go into confinement at the bidding of the board, in some place designated by them, so long as they shall consider it necessary, however grievous it may be to him, and however great may be his pecuniary loss in consequence.

The powers of the board in these respects cannot be questioned, for they are expressly conferred; and if they are exercised in good faith, and with proper care and prudence, in the manner prescribed by the statute, the board cannot be made responsible for mere errors of judgment, whatever may be the consequence. And we think a like construction must be given to the sections of the act in question in this suit, as we have already intimated. The statute commences by declaring that the board of health "shall have all the powers necessary and proper for the preservation of the public health and the prevention of the spreading of malignant diseases." The second section commences by declaring that it shall be the duty of the board to "examine into all nuisances and sources of filth injurious to the public health, and cause to be removed all filth found within the town which in their judgment shall endanger the

health of the inhabitants." Here power is expressly given to decide what constitutes filth, and if they merely err in judgment there can be no redress. This is conceded, but it is said that the statute makes a distinction between nuisances and filth. What distinction there can be in fact in respect to their baneful influence upon contagious and malignant diseases it is difficult to see. Poisonous exhalations may come from both, and both may be free from them; in the latter case they will not come within the control of the board. If either is injurious to the public health, it must be so because it sends forth noxious effluvia. Such effluvia could be as easily detected coming from the one as from the other. There is no reason for the distinction, and we think none exists. Further on in the section it is provided that "when any such filth or nuisance shall be found on private property, such board shall notify the owner or occupant of such property to remove the same at his expense, within such time as the board shall direct," (that is, remove the nuisance as well as the filth), "and after the expiration of such time such board shall cause such filth or nuisance forthwith to be removed or abated." Here nuisances are classed with the filth first described, where the power to decide with regard to it and order its removal is expressly conferred. What ground is there for any distinction? We see none, and clearly none exists. And further, by the common law a private person has the right to abate a private nuisance that does him harm, without resort to the courts for redress. But in such case he abates at his peril. He cannot justify the act done unless he proves that the supposed nuisance was one in fact. This is the doctrine the plaintiff insists should govern this case. But unless the statute goes further than this, nothing was accomplished by its enactment, and neighborhoods afflicted with malignant diseases might as well have been left to their rights at the common law.

But it is said that any other construction of the act renders it unconstitutional, and for the reasons that it takes away the right of trial by jury; that it deprives the owner of his property without due process of law; that it confers judicial powers upon a tribunal not warranted by the Constitution; and that it takes private property for public use without compensation.

By the common law a party has the right to defend himself from any assailant even to the taking of life when necessary, and even to

the taking of life when not necessary in fact, but apparently so. If life may be protected by destroying life, when apparently necessary but not so in fact, may not life be protected by destroying property when apparently necessary, though afterward discovered not so in fact? But it may be said that this right of self-defense comes when the assailed party seems to be driven to the last extremity. So here, the justification of the board of health in the destruction of property must come in seemingly extreme cases, where there is reasonable ground to believe that immediate action is necessary for the preservation of the life and health of the inhabitants, and when there is reasonable ground to believe the supposed nuisance to be one in fact.

We go no further in this case than its exigencies require. We leave undecided how far the board of health may go in other cases, where the destruction of property may not seem to require such summary action. It is expressly found in the case that the board acted in good faith throughout these transactions, and in addition thereto such facts are detailed as go to show that they acted with extreme caution. We cannot doubt the constitutionality of the act when rightly considered. It is nothing more or less than a police regulation. The property was not taken for public use within the meaning of the Constitution. It was destroyed for the protection of the public health.

The cases cited by the plaintiff throw but little light upon the question we are considering. They are based upon statutes differing materially from our own, and upon facts raising other questions and other issues than are involved here. The case coming nearest to the present one in its facts and in the principles involved is that of *City of Salem v. Eastern Railway Co.*, 98 Mass. 431, in which the court remarks as follows: "The authority of the board of health in respect to particular nuisances stands upon similar ground [that is, that of police regulations.] Their action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed and delayed as little as possible by the necessary observance of formalities. * * * There are many cases in which powers of determination and action, of a *quasi* judicial character, are given to officers intrusted with duties of local or municipal administration, by which not only the property but the lives of in-

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dividuals may be affected, and which, from their nature, must be exercised, finally and conclusively, without a hearing, or even notice to the parties who may be affected. Of this class are the authority of fire-wardens or other officers to direct buildings to be demolished to prevent the spreading of fires; of magistrates to require aid, and to use force, armed or otherwise, to suppress tumults; of the mayor or other officers to call out the military force for the like purpose. * * * We think these principles apply to the proceedings of a board of health. Their determination of questions of discretion and judgment in the discharge of their duties is undoubtedly in the nature of a judicial decision, and within the scope of the powers conferred, and for the purposes for which the determination is required to be made, it is conclusive. It is not to be impeached or set aside for error or mistake of judgment; nor to be reviewed in the light of new or additional facts. The officers or board to whom such determination is confided, and all those employed to carry it into effect, or who may have occasion to act upon it, are protected by it, and may safely rely upon its validity for their defense. It is in this sense that such adjudications are often said to be conclusive against all the world; and they are so, so far as the *res* is concerned." We think the act is constitutional.

We think there is nothing in the claim that the board that passed the vote declaring the brush a nuisance and injurious to the public health on the 8th day of December was a different board from the one that passed a similar vote on the 10th day of August of the same year, because it was composed of some new members who had been elected in the meantime. The board was the same, although all the members might be different. As well might it be claimed that the Superior Court changes as often as different judges preside.

The board being the same, it might well act in December upon what it had done in August preceding.

We further think that there was no error committed by the board in removing the brush in December, when it did not at that time endanger the life or health of the inhabitants. The board refrained from removing the brush in August, when the first vote of removal was passed, through fear that by so doing the poisonous effluvia would be greatly increased, and the malady which then prevailed would be aggravated in proportion. It became necessary, therefore, to remove the brush when it could be done in safety to the public health. And further, the brush was removed in December to pre-

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vent a recurrence of the malady the following summer. It was reasonable to suppose, if the brush, with the oysters upon it, had caused the contagious and malignant diseases that afflicted the village during the summer preceding, it would occasion like results the following summer. We think there was no error in this regard.

Complaint is made that the defendants destroyed the oysters as well as the brush. But the facts of the case furnish no foundation for this complaint. The court has found that the defendants did no unnecessary damage. This is equivalent to finding that the oysters were so attached to the brush that separation could not be made. We think there is nothing in this claim.

We advise judgment in favor of the defendants.

In this opinion the other judges concurred ; except GRANGER, J., who dissented.

GARDNER v. NEW HAVEN AND NORTHAMPTON COMPANY.

(61 Conn. 143.)

Carrier — passenger — contract — negligence.

The plaintiff, desiring to have his horse transported by defendant railroad, induced A., who had several horses to go by the same train, to include his and have it billed as A's. It was the defendant's rule that only one person could go free with stock, and when A. told the conductor there might be another person to accompany him, he replied that he would have to pay fare. The defendant had no knowledge of the plaintiff's intention to go on the train. The plaintiff got no ticket, but intended to pay his fare on the train. Before he could pay there was a collision by the defendant's negligence, and he was injured. *Held*, that he could not recover.*

ACTION for personal injury by negligence. The plaintiff had judgment below.

W. C. Case, for appellant.

C. R. Ingersoll and *W. B. Stoddard*, for appellee.

GRANGER, J. This is an action brought by the plaintiff to recover damages for an injury received by him while upon the cars of

* See *Houston and Texas Ry. Co. v. Moore* (49 Tex. 81), 80 Am. Rep. 98.

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the defendant, a railroad corporation and common carrier of freight and passengers. The Superior Court, upon demurrer overruled and a hearing in damages, rendered judgment for the plaintiff to recover \$1,000 damages. The defendant appeals, and the case is before this court upon that appeal.

Two reasons of appeal are assigned :

First. Because upon the facts found by the court the plaintiff was at the time of the accident a trespasser on one of the defendant's freight trains, upon which no passengers were transported, and seeking to obtain a passage on the road without the consent or knowledge of the defendant and without payment therefor ; and that he is therefore not entitled to recover for the damage which he claims to have received.

Second. That certain questions and answers (stated in the finding) were inadmissible, and that the court erred in receiving them.

The whole controversy in the case depends upon this question — was there any contract relation, express or implied, between the plaintiff and the defendant in this case ; or, in other words, was the plaintiff a passenger according to the legal meaning according to the legal meaning of the term on the defendant's road at the time the accident happened ?

We have no hesitation in answering this question in the negative, and in saying that the defendant, under the facts disclosed in the finding, was not liable for more than nominal damages. The plaintiff was in no legal sense a passenger on the road, but was in the car at the time without the consent or knowledge of the defendant. This clearly appears from the facts disclosed. The train upon which he was injured was, so far as the case shows, exclusively a freight train ; there was no passenger car attached, and no invitation to the plaintiff nor to the public to take passage upon it. The plaintiff paid no fare, and whether he intended to pay or not when called upon is of no consequence, so that his good or bad faith in taking his place on the car among the horses is quite immaterial. He had no business to be there without the consent of the defendant, and he had no rights except that of immunity from willful and wanton injury common to all citizens. Railroad companies have the clear and undoubted right to make rules and regulations that are reasonable and proper for the running of their trains. It would be impossible to conduct their vast business otherwise. If a person desires to be transported as a passenger he must comply with the

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rules of the company in regard to payment of fare and conduct while on the train, and all other reasonable requirements of the company. If a person desires to have his goods transported he must in like manner comply with the rules of the company in relation to all matters appertaining to the shipment, transfer and delivery of the goods transported. The whole duty of the company toward shipper or passenger is the duty resting entirely upon contract, express or implied.

Now what was the contract duty of the defendant toward this plaintiff? Was there any? What are the facts? The plaintiff really had no transaction whatever with the defendant. He bought no ticket, paid no freight, in no way made himself known to the company or any of its agents or employees, either as passenger, shipper, or custodian of any of the horses which had been shipped by Avery. This person, it seems, on the 14th of October, 1881, contracted with the defendant corporation to transport eight horses from Huntington, Massachusetts, to Harlem river or New York. Avery owned but seven of these horses; one belonged to a brother of the plaintiff, Rev. Dr. Gardner of New York. The plaintiff had the custody of this horse. Avery was applied to by him prior to October 14, to permit this horse to go along with his horses under the same way-bill and to permit the plaintiff to accompany it. Avery engaged cars of the defendant for the eight horses a day or two before the fourteenth, at which time he was fully informed by the defendant of its rates and rules for the transportation of live stock. One of these rules was that "one person will be allowed to pass free when accompanying his stock to take care of it and paying the price for not less than nine thousand pounds, and in no case will he be allowed to ride free on a passenger train."

At this time Avery said to the defendant's agent that there might be another man to go with him, and he was told by the agent distinctly that one of them would have to pay fare. Avery at this time made no mention of the plaintiff and did not disclose the fact that he was not the owner of all the eight horses. The name and existence of the plaintiff, the fact that he had any interest in one of the horses, or that he intended to accompany Avery, was, studiously or otherwise, concealed from the defendant. Avery in this transaction must be held to be the agent of the plaintiff and must be presumed to have communicated to him the terms upon which the animals were shipped; if not, the plaintiff was bound to

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ascertain for himself, before he started upon the train with the horses, whether or not he had a right to be there. The defendant concealed nothing; the rules and regulations were known and read of all men who had dealings with the company, or might have been, and it would have been very easy for the plaintiff to place himself in a correct position in relation to the company; but the facts all show that he was in a false position, and whether he intended to go on the train as a stow-away or not, is as we have said, immaterial.

An excuse, or something in its nature, is claimed by the plaintiff for his non-payment of fare. It is said that there was not time for him to procure a ticket after the horses were loaded and that he was expecting to pay his fare when the conductor called for it. But the case does not show that it was the custom of conductors, or their duty, on a train of this character to call for fares or tickets; for aught that appears it was a stock train without any passenger car attached, while it also appears that the plaintiff was in one of the cars with the horses. It will be remembered that the rules of the company permitted one person to ride in the car with his stock to look after and take care of it, and it is a reasonable presumption that the conductor was not expected to go through the stock car for the purpose of collecting fare or taking up tickets. It is a place where passengers would not be likely to ride unless the safety of their stock required it, or unless their intent was to secure a free ride.

The plaintiff then of his own motion placed himself in this car with the horses without the consent or knowledge of the defendant, and against the rules of the company as to payment of fare. He well knew, or had the means of knowing, that he had no right there as a passenger, and he also knew, or ought to have known, that it was a place of extra hazard; a car loaded with horses being, in case of collision or any serious accident, any thing but a safe or desirable place for a passenger. Whatever injury the plaintiff received we think therefore must be attributed to his own neglect or misconduct in placing himself in a position of peril without any express or implied assent on the part of the defendant.

The question as to the admissibility of the evidence objected to is substantially disposed of by the foregoing considerations. The intention of the plaintiff to pay his fare if demanded, under the facts found, was immaterial; his intent could not change the

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position of the defendant, or make it liable *ex contractu*. If he had actually paid his fare the case would present an entirely different aspect, but as the facts now stand he has no claim for more than nominal damages.

There is manifest error in the judgment complained of and it is reversed.

Judgment reversed.

In this opinion PARK, C. J., and LOOMIS, J., concurred ; CARPENTER, J., dissented ; PARDEE, J., did not sit.

 ROWE V. SMITH.

(51 Conn. 286.)

Boundary — width of bay — reach of eye — "middle of channel."

In determining whether a bay or harbor is not wider than the reach of the eye, it is not necessary that a person on one side should be able to discern upon the other the ordinary movements of men with sufficient minuteness and certainty to testify to them in a court of justice ; but it is sufficient if the ordinary eye can, in ordinary weather, discern the human figure, see that it moves, and distinguish between walking and running.

The "middle of the channel" means the space within which vessels usually pass.

TRESPASS on an oyster bed. The opinion states the points. The plaintiff had judgment below.

W. C. Robinson and R. S. Pickett, for appellants.

J. W. Alling, for appellee.

PARDEE, J. This case has previously been before this court. *Rowe v. Smith*, 48 Conn. 444. It was then said as follows : " In 1785 East Haven was carved from New Haven and incorporated as a town ; it borders upon Branford eastwardly, upon the Sound southwardly, and upon the bay and harbor of New Haven and East river westwardly. In 1803 the legislature defined the separating line of territorial proprietorship between New Haven and East Haven as passing from the mouth of East river, along the middle of the

channel of the bay or harbor, to an intersection with the line drawn from the shore of one town to that of the other, between points from one of which objects and actions can be seen by the naked eye from the other, which point of intersection as it existed in 1803 is to be fixed by the jury. From that point to the southern boundary of the State the western limit to navigable waters over which the State thereafter administered public and private justice through the instrumentality of East Haven, and consequently the western limit to the navigable waters of that town, within the meaning of the statute permitting an allotment of ground to individuals for the cultivation of oysters, is a meridional line."

Upon the re-trial it was necessary to locate the line crossing New Haven bay or harbor between points from one of which objects and movements can be seen by the naked eye upon the other; also the line passing from the mouth of East river along the middle of the channel of the bay or harbor to an intersection with the eyesight line.

The plaintiff claimed, and offered evidence tending to prove, that the eyesight line crossed the bay or harbor from the center of the old lighthouse on the east shore to ordinary high water mark on the southern extremity of Savin Rock on the west. This is called the south line. Concerning it the finding is that "actions and movements of persons, animals and vehicles, and objects and persons, on the one or either shore, can be reasonably discerned from the other shore by the naked eye, and that there are no points on the opposite shores below or south of this line where the naked eye can so discern objects or actions or movements. The length of the line claimed by the plaintiff is two and three-fourths miles. On the south line, in ordinarily clear weather, persons of ordinary visual powers in looking from one shore to the other can, with the naked eye, discern on and near the opposite shore buildings, wharves, docks, trees, steamboats and vessels, and other objects of that kind. They can also in like manner see vehicles and the animals drawing them, and the movements of the same from point to point. They can also see human beings, single and in groups, but cannot distinguish their clothing, and cannot distinguish men from women. They can see them singly or in groups move about from point to point, and move faster or slower as if walking or running; can see them go into and out of the water as if bathing; can see them get out of and go into steamboats; can see them leave and come on to

a wharf or dock. In very favorable states of the weather and the light such observers could see persons get into and out of small boats and carriages near the shore. Under no circumstances could such ordinary observers see any movement of the limbs as such. Some of the witnesses produced however could see bendings of the body and movements of the limbs and other actions and movements. But such witnesses seemed to be endowed with somewhat greater powers of vision than ordinary people."

The defendants claimed, and offered evidence tending to prove, that the eyesight line crossed the bay or harbor from Fort Hale on the east shore to Sandy Point on the west. This is called the north line, and is one mile and twelve-hundredths in length. The court finds that on this line "in ordinarily clear weather persons of ordinary eyesight, in looking from one shore to the other with the naked eye, can discern objects and actions on the opposite shore somewhat more distinctly than on the south line. Human beings can be seen to lie or sit down or bend over and get up. The motions of the arms when being raised at right angles to the body can be faintly seen by close observation, and also the moving of a garment, such as a coat and the like. The dress however cannot be seen, nor the limbs except as above stated, nor can a man be distinguished from a woman."

The defendants also claimed that objects and actions upon Savin Rock could not be discerned from the lighthouse with the naked eye with sufficient distinctness to make the line from one to the other an eyesight line within its legal meaning as constituting the southern limits of towns on Long Island Sound. The court overruled these claims and the defendants excepted.

To avoid inconveniences which would attend the administration of justice if the line marking the end of the jurisdiction of common law and the beginning of that of admiralty should be allowed to follow closely all indentations of the sea, it was early determined that bodies of water not greater in width than the reach of the eye should be regarded as land. Of course that distance cannot be reduced to a certainty by the surveyor's chain. The power of the eye is not the same in all ; and there is no fixed standard as to the degree of distinctness with which objects and movements must be seen.

It is the claim of the defendants that the shores can be no farther separated than that from one a person of ordinary eyesight can,

in ordinary weather, discern the ordinary acts performed on the other with sufficient minuteness and certainty to testify to them in a court of justice. If we remember that in most cases of judicial investigation it is necessary not merely to prove that an act has been done, but to identify the person doing it, this claim is practically that the separating space shall be no wider than that the ordinary eye can identify persons across it.

But we think the rule satisfied when the ordinary eye can discern the human figure ; can see that it moves ; that it enters or leaves a small boat ; and can distinguish between walking and running.

In *United States v. Grush*, 5 Mason, 290, STORY, J., said : " The general rule, as it is often laid down in the books, is, that such parts of rivers, arms and creeks of the sea are deemed to be within the bodies of counties where persons can see from one side to the other. Lord HALE uses more guarded language, and says, in the passage already cited, that ' the arm or branch of the sea which lies within the *fauces terræ* where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county.' Hawkins (P. C., b. 2, ch. 9, § 14,) has expressed the rule in its true sense and confines it to such parts of the sea where a man standing on the one side may see what is done upon the other. And this is precisely the doctrine which is laid down by STANTON, J., in the passage in Fitzherbert's Abridgment, *corona*, 399, on which Lord COKE and the common lawyers have laid so much stress as furnishing conclusive authority in their favor. It is there said that it is no part of the sea when one may see what is done on the one part of the water and the other, or to see from one land to the other. * * * I do not understand * * * that it is necessary that the shores should be so near, that all that is done on one shore could be discerned and testified to with certainty, by persons standing on the opposite shore ; but that objects on the opposite shore might be reasonably discerned, that is, might be distinctly seen with the naked eye and clearly distinguished from each other. Indeed, upon the evidence before me, I incline strongly to the opinion that the limits of the county of Suffolk in this direction not only include the place in question but all waters down to a line running across from the lighthouse on the Great Brewster to point Olderton." ' This was a distance of a mile and one-fourth, as the case finds, if we are not mistaken.

In *Public Opinion*, 2 Hagg. 399, the court speaks of a locality

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as being "very near to the land of Yorkshire and not above three miles from the Lincolnshire coast, and therefore not beyond the reach of sight and the ordinary cognizance of juries." In *Commonwealth v. Peters*, 12 Met. 387, SHAW, C. J., says: "All creeks, havens, coves and inlets lying within projecting headlands and islands, and all bays and arms of the sea lying within and between lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side, are to be taken to be within the body of the county."

It also became necessary for the court to determine the location of the line passing from the mouth of East river along the middle of the channel of the bay or harbor of New Haven and the point of its intersection with the eyesight line. In the legislative description of the line between East Haven and New Haven the expression "middle of the channel of the bay or harbor" does not refer to the thread of deepest water, but to that space within which ships can and usually do pass. Therefore the court committed no error in determining that the town line was in the middle of this space.

Webster defines a harbor "as a bay or inlet of the sea in which ships can moor and be sheltered from the fury of the winds and heavy sea; any navigable water where ships can ride in safety." The court finds that inside of the line drawn from the old light-house to Savin Rock large numbers of vessels seek and find protection from all storms other than those from the south, south-west, and west, and determines that the bay or harbor of New Haven extends to that line. We think there is no error in this conclusion.

[Minor matter omitted.]

There is no error in the judgment complained of.

PARK, Ch. J., and CARPENTER, LOOMIS and GRANGER, JJ., concurred.

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(51 Conn. 311.)

Agency — vested interest — termination.

▲ general agent for an insurance company, discharged for failure to account according to his contract, has no interest in premiums thereafter to be collected on policies issued through his agency.*

* See *North Car. State Life Ins. Co. v. Williams* (91 N. C. 69), 49 Am. Rep. 637.

ACTION on bond. The opinion states the case. Case reserved.

A. P. Hyde and F. Hyde, for plaintiffs.

A. Brandegee and P. H. Hutchinson, for defendants.

LOOMIS, J. The bond in suit, which is for \$5,000, dated April 25, 1872, was given to the plaintiffs by Holloway as principal and the other defendants as sureties, conditioned that Holloway (having been appointed general agent of the plaintiffs for the purpose of procuring applications for life insurance and collecting premiums thereon), should, "on the first day of each month, pay or hand over all moneys belonging to said company which might at any time be received by him, as also all moneys which he then owed or might thereafter owe the company, and should faithfully discharge his duties as such agent." Holloway commenced the business of his agency on the 1st of May, 1872, and made monthly reports of all moneys received by him or his sub-agents, and settled for the same regularly till January, 1878, when he made his report for the month preceding, and then informed the plaintiffs that he would not be able to pay in full the amount called for by that report. The plaintiffs insisted upon his paying all that he owed, and upon ascertaining that there was a deficit in his accounts for the months of December and January of over \$18,000, which he refused to pay, removed and discharged him from his agency for that cause.

That there was a clear breach of the condition of the bond is too obvious from the finding to require the least discussion. The only debatable question in this connection is as to the extent of the breach or amount of deficit, which we will consider hereafter.

The principal contention centers in the question whether Holloway, under his contract with the plaintiffs, had such an interest in the premiums that should be thereafter collected on policies issued within the territorial jurisdiction of his agency, as would remain unaffected by his default and removal from office. Such is his claim, and if well founded, and he can recoup the damages or set off the amount in this action, no recovery can be had in favor of the plaintiffs, for it is found that the amount of Holloway's commissions on such policies would exceed the amount of his indebtedness to the plaintiffs.

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Waiving any discussion of the question whether any set-off can be allowed in a suit brought, as this was, before the commissions became due, we proceed to consider whether Holloway has any right at all to the commissions in question. While he remained agent he had a right to collect the premiums, and of course a right to his commissions, and if the plaintiffs had wrongfully deprived him of his agency, it would lay the foundation for a recoupment of the damages resulting from such wrongful act. It becomes therefore important at the outset to inquire whether, under the circumstances disclosed by the finding, his removal from office was justifiable? Manifestly it was; and not only so, but a positive duty, which, had the directors of the company neglected, would practically have made them guilty participants in any future defalcation by the same agent. Such conduct on their part would wrong both the stockholders of the corporation and the sureties of the agent, and would shock the sentiment of common honesty. But what are the consequences of such a removal from office? Nothing, say the defendants, except the mere right to obtain new insurance and issue new policies; as to all existing business and all renewals of existing policies, the agent takes the benefits of a continuance in office without any of its obligations, responsibility or labor. Such a doctrine we believe has no support in good reason or good law.

The defendants contend that Holloway's interest in the future premiums that might be collected on existing policies or renewals thereof was a vested property interest, which could not be divested or confiscated by any act of the plaintiffs.

It may well be conceded that the act of the company alone could not work such a result, but coupled with the defendant's own act it may have that effect. Whatever right Holloway had was under his contract, but when that ceased to operate through his own misconduct there was no longer any foundation for his future right to rest upon. We do not mean to say that the right to the commissions must always depend on the right to collect the premiums. It is possible that the two things should have an independent existence, as where an agent is removed without fault on his part or for only a slight fault; but where he is guilty of such misconduct as this case discloses, he deprives himself of the right to set up his broken contract as a continuing one for his own benefit.

If gross misconduct on the part of a hired servant may forfeit the right to recover for previous faithful service, as Lord TENTERDEN

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said it might, in *Atkin v. Acton*, 4 Car. & Payne, 208, with stronger reason, as would seem, it might forfeit rights that relate wholly to the future, as in this case. The doctrine is now too well settled to be longer called in question, that in contracts of hiring there is an implied condition that the servant will perform the duties incident to his employment honestly, and will do nothing injurious to his employer's interest, and that if he proves radically unfaithful to his trust or is guilty of gross misconduct he forfeits all right to compensation. *Bixby v. Parsons*, 49 Conn. 463; s. c., 44 Am. Rep. 246; *Champion v. Hartshorne*, 9 Conn. 564; *Callo v. Brouncker*, 4 Car. & Payne, 518; *Wood Mast. and Serv.* 166.

The same principle has been recognized as applicable to agents of insurance companies. *Myers v. Knickerbocker Life Ins. Co.*, 2 Bigelow's L. and Acc. Ins. Rep. 149; *Ensworth v. N. Y. Life Ins. Co.*, 7 Am. Law Reg. (N. S.) 332.

The argument so far has proceeded upon the assumption that but for the misconduct of Holloway, he would have had a right to commissions on premiums paid after the termination of his agency. The right however, if it exists at all, must be found in the contract between the parties. *Spaulding v. N. Y. Life Ins. Co.*, 61 Me. 329; *Partridge v. Phoenix Life Ins. Co.*, 15 Wall. 573.

The contract in the case at bar only provided for the termination of the agency in one of two ways: 1. The agency might be sold by the defendant with the aid of the plaintiffs to a person acceptable to the latter, and subject to the same duties and privileges. 2. If the defendant should die while in office the plaintiffs would make some arrangement whereby his heirs might have the equitable value of the agency. There might be some ground for claiming that all Holloway's rights as to the future (including commissions on future premiums), must be considered as merged in and limited by these special provisions. But the termination of the agency here contemplated was one for which the agent was not in fault. What has actually occurred was not provided for, but as the provisions referred to and the act of the plaintiffs in taking a lien on the agency recognize a value in it beyond the time of Holloway's actual occupation of the office, we think it should be implied that the company would not wantonly deprive him of the agency without recompense. We think therefore he had a right to continue his agency so long as he faithfully performed its duties, and that a removal without cause would have

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entitled him to recoup damages against the plaintiffs to the amount of the equitable value of his agency at the time he was so removed. But his defalcation and consequent removal carried with it, not only the loss of commissions on renewals of existing policies, but the loss of his agency also for all purposes, whether for selling to another or for transmitting it to his heirs.

Our conclusion therefore is that the amount found due by the committee cannot be reduced by any claim which Holloway makes by way of set-off or recoupment.

[Minor considerations omitted.]

We advise the Superior Court to render judgment in favor of the plaintiffs against all the defendants for the sum of \$5,000, with interest from the date of Holloway's defalcation.

Judgment affirmed.

In this opinion the other judges concurred.

BUTTON V. FRINK.

(51 Conn. 343.)

Negligence — burden of proof — runaway horse.

In case of injury by a runaway horse on a highway the burden of proof of negligence is on the plaintiff.*

ACTION for injury to person and property by a runaway horse. The opinion states the case. The plaintiff had judgment below.

C. F. Thayer and J. M. Thayer, for appellee.

J. Halsey and S. Lucas, for appellant.

PARK, C. J. The defendant's horse and wagon collided with the plaintiff's horse and carriage while the same were being driven by the plaintiff and defendant upon a public highway, in which collision the plaintiff received injury in his person and property.

Upon the trial of the cause, the defendant introduced evidence

* See *Buschling v. St. Louis Gas-Light Co.* (73 Mo. 219) 39 Am. Rep., 508.

to prove that at the time of the accident his horse was unmanageable, having become so in consequence of the breaking of the bit attached to the bridle, and was running away.

Regarding the transaction the court charged the jury as follows: "If the defendant ran into the plaintiff's carriage as stated in the complaint, he is not absolved from blame by the mere fact that his horse was running away upon the public highway, as claimed by the defendant. That fact is a circumstance in this case from which negligence on his part might be inferred, in the absence of explanatory testimony showing that he was guilty of no negligence or folly."

Herein we think the court erred. The plain import of this language is, that in the absence of explanatory testimony by the defendant, showing that he was guilty of no negligence in fact, negligence might be inferred against him as a matter of law, from the mere fact that his horse was running away. It is true that the court uses the phrase, "might be inferred;" but in the connection this is equivalent to should be inferred; for the court is stating a rule to the jury for their application and guidance in coming to a decision of the question regarding the negligence of the defendant, and the jury so must have understood it.

However this question may be regarded by some courts in some jurisdictions, we think it is clear that in this State questions of negligence are questions of fact, to be determined by the jury, under instructions from the court. In the case of *Beers v. Housatonic R. Co.*, 19 Conn. 566, the marginal note is as follows: "Whether there was negligence or want of care, in whatever degree, in either of the parties, is a question of fact, to be determined by the jury; and whether the circumstances attending that transaction constitute such negligence or want of care, will not, though admitted, be decided by the court as matter of law, but will be left to the jury, as evidence for them to pass upon."

In this case the claim was made that the court should determine, as matter of law, that the plaintiff was guilty of negligence in driving a large herd of cattle across the defendants' railroad at a time when he knew that the defendants' cars were about to pass. But Judge STORRS, in giving the opinion of the court, said: "When it is considered that negligence, or a want of due care, was here the main fact to be ascertained, and that the facts, or more correctly speaking the circumstances, thus given in evidence, were only evidential of such main fact and conducing to prove it, it is obvious

that the court could not have pronounced that those circumstances proved the existence of negligence or a want of due care on the part of the plaintiff, without encroaching on the rights of the jury, whose exclusive province it was to weigh the evidence and determine whether it was sufficient for the purpose."

In the case of *Park v. O'Brien*, 23 Conn. 339, the marginal note is as follows: "The question of negligence is one exclusively of fact, for the jury to determine. Therefore where it was claimed that the court should instruct the jury, that it being admitted that the horse of the plaintiff was a spirited animal, the act of the plaintiff in leaving him unfastened and unattended in a public street was, as a matter of law, a want of ordinary care on his part, it was held that the court committed no error in leaving the question, whether the plaintiff had or had not been guilty of negligence, to the jury." In this case the court said: "The question as to the existence of negligence or want of ordinary care is one of a complex character. The inquiry, not only as to its existence, but whether it contributed with negligence on the part of another to produce a particular effect, is much more complicated. As to both, they present, from their very nature, a question not of law but of fact, depending upon the peculiar circumstances of each case, which circumstances are only evidential of the principal fact, that of negligence or its effects, and are to be compared and weighed by the jury, the tribunal whose province it is to find facts, not by artificial rules, but by the ordinary principles of reasoning, and such principal fact must be found by them before the court can take cognizance of it and pronounce upon its legal effect." Cases could have been cited which hold that leaving a spirited horse in a public street unfastened and unattended was negligence *per se*. In *Illidge v. Goodwin*, 5 C. & P. 190, TINDAL, C. J., said: "If a man chooses to leave a horse and cart standing in the street without any person to watch them, he must take the risk of any mischief that may be done." Other cases might be cited. Still our court held, as we have seen, that the question in such cases is one of fact for the jury to determine.

If a horse is running away with his driver, there is nothing in the fact itself which tends to show negligence in the driver, or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise, and it would seem that it could as well be inferred, in such a case, that the party residing in the house was

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guilty of negligence in causing its destruction, in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that a horse is running away, that the driver is guilty of negligence in causing his running, in the absence of proof to the contrary. If such a doctrine should be established as the law, it is not easy to see to what extent it might not be carried.

The plaintiff relies upon four cases to sustain the charge. The first is that of *Unger v. Forty-second Street & Grand Street Ferry Railroad Co.*, 51 N. Y. 497. The plaintiff in that case was injured by a pair of horses which were running away in a public street without a driver. The question was, whether the court below erred in refusing to nonsuit the plaintiff upon the evidence of such fact alone. The court say: "The fact that the horses were unattended and unfastened in the street was, unexplained, evidence of negligence against the defendant. Hence the court committed no error in refusing to nonsuit the plaintiff."

The next case is that of *Strup v. Edens*, 22 Wis. 432. In this case the plaintiff's daughter was injured by the horses of the defendant while running away. And the question again was, whether the court erred in refusing to nonsuit the plaintiff. The court say: "There was evidence tending to show that the horses were not properly hitched. And in addition to this evidence, the fact that the horses got loose and ran away is some evidence of negligence. It is true such a thing might occur notwithstanding due care in hitching. But such would not be the ordinary result, and unexplained, the reasonable inference from the fact would be that there had been negligence in fastening the horses."

It will be observed that in both of these cases the court held that the fact that the horses were running unattended in the public street, afforded some evidence that the horses had been left, either unfastened in the public street, or improperly and negligently secured. Manifestly this is an inference which could not be drawn in the case at bar. And furthermore these cases are cases of nonsuit, where the court had to consider the question of negligence as a question of fact, and this accounts for the language of the court.

The other two cases are found in Brightly's Reports of *Nisi Prius Cases*. In neither of them do the facts appear.

But it may be said in the case under consideration that the charge of the court did the defendant no harm, inasmuch as he offered evidence explanatory of the cause which made his horse unmanage-

able and excited him to run away. But the mischief of the charge, in this regard, lies in the fact that it changes the burden of proof from the plaintiff to the defendant. Hence if the question was nicely balanced, or if the jury did not believe the defendant's exculpating evidence, the plaintiff succeeded in consequence of the error of the court in changing the burden of proof.

To prevent any misapplication of our present decision we state the general principle which we conceive to govern all cases of this sort. It is that the question of negligence on the part of the defendant, when it is a part of the plaintiff's case as necessarily alleged and therefore necessary to be proved, and the allegations of the declaration are traversed, is a matter to be made out by the plaintiff's proof, and not by the defendant's failure of proof; that there is no rule of law that shifts the burden of proof upon the defendant; that where the neglect of the defendant to explain the facts which indicate his negligence operates to strengthen the inference of negligence, it does so wholly as a matter of evidence, producing its effect in the ordinary manner on the judgment of the jury, and not by any superadded force of law; that the cases where the proof on the part of the plaintiff of the damage done him by the defendant is enough to make a *prima facie* case of negligence on the part of the defendant, are cases where the act causing the damage was of a nature to indicate negligence, and this as the act addresses itself to the judgment of the jury on this point, and is distinguishable by their judgment from an act which does not indicate negligence, they judging for themselves of the character of the act in this respect. This distinction can be illustrated thus: A man driving furiously along the street runs into my carriage and breaks it. Here the act indicates negligence on the part of the driver. Again, the defendant's horse is running furiously along the street, dragging the shafts of a carriage after him, and runs against and breaks my carriage. This indicates accident only, and not negligence. It is a mere matter of human presumption in each case. The common judgment of mankind would see in the one case a *prima facie* case of culpable negligence—in the other only of sheer accident. Now, in suits brought for damages done in these cases, if the plaintiff should prove only the fact of the collision, and the defendant should offer no evidence whatever, the court ought to charge the jury that the burden of proof is not in either case thrown upon the defendant as matter of law, but that the plaintiff is to recover

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or not, according as they shall, in the exercise of their judgment, consider the acts as in themselves indicating or not indicating negligence on the part of the defendant. The failure of the defendant to offer any explanatory evidence may operate to strengthen the plaintiff's case, but it must always be in a case where the act done carries in itself an indication of negligence, or, in other words, creates a presumption of fact, not of law, that the defendant had been guilty of negligence.

There is error in the judgment complained of.

In this opinion the other judges concurred.

 COIT V. COMSTOCK.

(51 Conn. 362.)

Will — trust for charity.

A bequest for a charitable institution to be incorporated by the name of the Smith Memorial Home, for aged, respectable, indigent women who have been residents of New London, is valid.*

A bequest for permanently keeping burial lots in order and for maintaining religious services is void as to the former.†

SUIT for construction of a will.

J. Halsey and A. Brandegee, for legatees.

H. C. Robinson, Chadwick and A. C. Lippitt, for defendants.

PARK, C. J. The principal question in this case grows out of a devise and bequest in the will of the late Seth Smith, of New London, which is as follows :

[Omitted.]

Two questions are presented for the consideration and determination of this court regarding this bequest.

1st. Are the beneficiaries described sufficiently to enable a court of chancery to carry it into effect ?

2d. Is it obnoxious to our statute against perpetuities ?

*See *Sowers v. Cyrenius* (39 Ohio St. 29), 48 Am. Rep. 419.

†To same effect, *Bates v. Bates* (134 Mass. 110), 45 Am. Rep. 305.

The books are full of cases regarding the first question, wherein charitable uses have been discussed for centuries, by all grades of courts, from the lowest to those of last resort in England and in this country, and it would be unprofitable and useless to consider more than a few of them, for conflicting opinions abound, so much so that we must come at last to our own adjudications upon the subject, and perhaps to some of those of our sister States, for aid in arriving at a decision of the question.

The intent of the testator to create a public charity for the benefit of the aged, respectable and indigent women of the city of New London, is fully and clearly expressed. There is no mistaking his object and purpose; and his right to dispose of his property in the manner indicated cannot be questioned. Indeed it is said that gifts to public charity are highly favored by the law, and courts of chancery will uphold them if it can possibly be done. "This is a charity, which a court of equity is bound to uphold if practicable," said Judge FOSTER, in *White v. Howard*, 38 Conn. 366. "Charities are highly favored in law, and they have always received a more liberal construction than the law allows to gifts to individuals." 1 Story Eq. Jur., § 1165. "Courts look with favor upon charitable gifts, and take especial care to enforce them, and guard them from assault, and protect them from abuse." Perry on Trusts, 630. "Gifts to charitable uses are highly favored in law, and will be most liberally construed in order to accomplish the intent of the donor; and trusts which cannot be supported in ordinary cases, will be established and carried into effect where it is to support a charitable use." *Sanderson v. White*, 18 Pick. 333. "If it is once determined that the donor intends to create a public charity, very different rules from those which are applied in establishing private trusts will be applied, in order to effect the intent of the testator and establish the charity." Perry on Trusts, 629.

The beneficiaries in public charities must necessarily be described in general terms. They are persons in most cases yet unborn, and particularization is out of question. Classes may be described, running down through all time, but individuals can only be designated as belonging to such classes. Testators therefore in their description of parties to be benefited by their public charities must necessarily be confined to such terms as "the aged," "the indigent," "the sick," "the lame," "the infirm," "the destitute," of a certain class or of a certain territory. These terms have a customary

and popular meaning, and the parties to whom they apply are reasonably unmistakable, although the terms are indefinite to a certain extent. Our statute of charitable uses could find no better terms to define its meaning than the general phrases, "ministry of the gospel, and relief of the poor." Judge FOSTER, in *White v. Howard*, *supra*, says: "After all, there is no more uncertainty here than there is in the statute of 1702. If this devise is void for uncertainty then this provision in the statute must be void for the same reason. We should hesitate to pronounce a decision declaring one of the clauses of this ancient statute void for uncertainty." Perry on Trusts, 651, says: "In order that there may be a good trust for a charitable use there must always be some public benefit open to an indefinite and vague number. That is, the persons to be benefited must be vague, uncertain and indefinite, until they are selected or appointed to be the particular beneficiaries for the time being." Judge STORY in his work on Equity Jurisprudence, § 372, says: "Courts of equity now, in most of the States, take jurisdiction in carrying into effect charitable bequests, however general are the purposes and objects intended, if they are sufficiently certain to be intelligible." Indeed the famous statute of 43 Elizabeth, in enumerating "the pious and godly uses" to which it applies, employs no more definite descriptions than the following — "relief of the aged," "the maintenance of sick and disabled soldiers and marines," "the education and preferment of orphans," "the marriage of poor maids," "the supportation of tradesmen and handicraftsmen," that of "persons decayed," "the redemption of prisoners and captives."

It would be strange indeed, if the law should require a testator to be more particular in the description of the objects of his bounty in charitable bequests for the relief of such unfortunates, than are the terms of the statute itself which authorizes such bequests to be made.

The uncertainty that must exist in such cases is reduced to a certainty if a definite class of beneficiaries is described and a mode is provided for the selection of the particular objects of the bounty. *Id certum est quod certum reddi potest.* Judge STORRS, in *Brewster v. McCall's Devises*, 15 Conn. 292, says: "A devise is never to be construed as absolutely void but from necessity; if it be possible to reduce it to a certainty the devise is to be sustained." Judge DAGGETT said in *Bull v. Bull*, 8 Conn. 50: "If a rule is given by

which the persons can be described, if not with entire certainty, yet sufficiently so to uphold the devise, and if it can by possibility be upheld, it can never be pronounced void." The court in *Holmes v. Mead*, 52 N. Y. 322, said : "It is not material that the legatees should be definitely ascertained and known at the date of the will, or even at the death of the testator. It is sufficient if they are so described that they can be ascertained and known when the right to receive the legacy accrues."

In the case at bar the beneficiaries of the testator's bounty are described as definitely as could be expected in a bequest which was intended to be perpetual. Provision was made for the selection of the parties to be benefited from the class designated, by a corporation with sufficient by-laws and regulations for the purpose. This is equivalent to the appointment of trustees in perpetual succession to make the selection. Such being the case, we think that the best considered cases in this State and elsewhere sustain us in holding that this gift to public charity is valid, so far as the question we are now considering is concerned.

We will briefly consider a few of our own decisions on the subject. In the case of *Bull v. Bull*, *supra*, a remainder was bequeathed to executors, in trust for the most needy of the testator's brothers and sisters, with express authority and power to the executors to make distribution to the most needy. The court say : "Here it can be ascertained who are the most needy of the brothers and sisters and their children. A rule is given by which the persons can be designated, if not with entire certainty, yet sufficiently so to uphold the devise." This was a private charity, where, it seems, the rule of certainty in the description of beneficiaries is more stringent than is required in public charities ; still the description would seem to be as indefinite as in the case at bar. The case was saved by the power given to the executors to make a selection, which the law alone could never have done. It required judgment and discretion to ascertain the "most needy."

In the case of *Treat's Appeal*, 30 Conn. 113, a devise was made to trustees for the promotion of education and science among the Indian and African youth of the United States and elsewhere, with full power in the trustees to make selections of beneficiaries from the class designated. The court say : "As to the objects of the charity, what can be more unambiguous and certain ? The class is certain, and the individuals to be selected from

the class may be made certain by the selection of the trustees." Here again the devise was saved by the power given to the trustees to make selections from the class designated. It might have been asked as cogently in that case as similar questions are asked in this, what age is comprehended by the word "youth"? what number of years and days does it include, so that if any addition be made, the party will pass beyond youth, and be of an age beyond the limits of the devise? So again up to what mixture of Indian or African blood with the blood of other races of men, will a person still retain the Indian or African character or cease to belong to those races? There would seem to be as much uncertainty here as in the words "aged," "indigent," "respectable," youth—aged! The one is in the early part of life, the other in the latter; where one ceases, or the other begins, is manifestly equally indefinite. In the case of *White v. Fisk*, 22 Conn. 31, a bequest was made to trustees for the support of indigent pious young men—preparing for the ministry in New Haven. The court held the bequest void on the ground that no power was conferred upon the trustees to make selections from the class described, and that the description of the beneficiaries was too indefinite without such power. The court say: "The difficulty of carrying this provision into effect is as great as if no trustee had been appointed; for no rule of determination, selection or appointment is furnished by the will, and no positive or discretionary power of determination bestowed. It has been suggested that the power of selecting the beneficiaries under this bequest, and of apportioning the sums of money annually to be disbursed among them, is in the trustee. We do not so understand it. Their only power is to expend the money—to pay it out to the persons entitled under the will to receive it. * * * There is a class of cases, the authority of which we recognize, where the individual beneficiaries under a will, but included in a definite class, are left uncertain, and yet the bequest for their benefit has been sustained. But these are cases where the gift has been to some corporate or voluntary association, whose business and duty it becomes to dispense the charity; or where power is very certainly conferred by the will upon the executor or trustee, to discriminate and select, or to apportion the application of the funds. "Judge ELLSWORTH, in *Treat's Appeal*, *supra*, in commenting upon this case, says: "The testator had provided in his will no way of selecting the beneficiaries from a class, and the court held

that they could not, even as a court of equity, do it for him. Had that power been given to his executors or trustees, the clause in the will would have been sustained, and Judge Hitchcock would not have been disappointed in his benevolent purpose." The case of *White v. Fisk* has been strenuously urged to show the bequest in question void, but instead of showing this, the case sustains the legality of the bequest. The uncertain words in that case were, "indigent," "pious," "young." In the case at bar, "indigent," "aged," "respectable." The word "indigent" appears in both cases. Can any one say that the words "aged," "respectable," are more uncertain than the words, "pious," "young"? Still it appears by *Treat's Appeal* that *White v. Fisk* would have been sustained if power of selection had been given to the trustees.

There are many cases elsewhere which maintain the same doctrine. *Washburn v. Sewall*, 9 Metc. 280; *Odell v. Odell*, 10 Allen, 1; *Saltonstall v. Sanders*, 11 Allen, 446; *Jackson v. Phillips*, 14 Allen, 539; *Fellows v. Miner*, 119 Mass. 541.

Cases might be cited from other States to the same effect, but we think it unnecessary. We think the bequest is valid so far as this question is concerned.

Some question has been made with regard to the meaning of the phrase "have been residents of the city of New London." It is said that a will speaks from the death of the testator, and that the meaning of the phrase therefore is, have at that time been residents, etc. It is true that wills generally speak from the death of the testator, but there are many exceptions to the rule. The language of a will is to be construed according to the manifest intent of the testator as shown by the will. This bequest was intended to be perpetual. The corporation to hold the property during all coming time is burdened with the duty of making selections of beneficiaries from time to time, perpetually, and when selections shall be made, the parties selected shall then "have been residents of the city of New London." This is the obvious meaning of the phrase.

Some question has also been made in respect to the meaning of the word "home," as used in the will. But we think it is equally clear what was the precise meaning the testator attached to the word. He was describing a house for the permanent residence of the aged, indigent, respectable women of the city of New London. Webster defines "home" to be "a dwelling house; the house where

one resides ; residence." Surely, there is no uncertainty in the will regarding the meaning of the word.

Is the bequest void by our statute against perpetuities ?

The property is bequeathed to the executors of the will in trust for the public charity therein created, "until an act of incorporation can be obtained from the general assembly of the State of Connecticut."

It is said that should an act of incorporation never be obtained, the property would remain in the hands of the executors perpetually, and that subsequently the bequest is obnoxious to the statute.

It is manifest from the will that the testator intended that the property should remain in the hands of his executors but a short period of time. The language of the will is, "until an act of incorporation can be obtained." Clearly this act was to be procured as soon as it could be done. It is clear therefore that a reasonable time only for the act to be obtained was contemplated by the testator. But it is said that the State might refuse to grant the act. It is true that it may be within the limits of possibility that the sovereign power might refuse. And so might the donee of a gift refuse to receive a benefaction tendered. The State was to a great extent to be benefited by this public charity, for many of its citizens, who in part make up the body politic, were to be benefited through all coming time. It was scarcely possible therefore that the State would refuse such a benefaction tendered to its citizens, tendered in part to itself.

It is further said that no one is charged with the duty of bringing the matter to the attention of the legislature and procuring the act of incorporation. We do not so understand the will. The executors were burdened with this duty. They were appointed to execute the will, and they accepted the trust. A part of its execution was to carry into effect this bequest, and they would have been recreant to their duty had they neglected or refused to execute this important part of their trust. Executors must pay legacies, and this was in the nature of a legacy to the "aged, indigent, respectable women of New London." Their duty could not have been fulfilled until they had procured an act of incorporation, and transferred the property to the corporation when organized. Hence the gift of the property to the executors was for them merely to hold for such a reasonable time as might be sufficient for them to procure an act of incorporation from the legislature, and then trans-

fer the property to the corporation as soon as it should become organized. Surely the will itself was not obnoxious to the statute. What would have become of the property if an act of incorporation had not been procured within such reasonable time, it is not necessary to consider.

There is another view of this question. The testator in this bequest declares his object and purpose to be the founding of a home for the aged, etc., which should endure forever. He realized that men must die, but corporations never die. He desired therefore to have the charity under the management and administration of a corporation that should endure as long as the home should exist. To carry out this object he gives the property to his executors, to be transferred to the corporation as soon as it should be chartered and organized. The instrumentality of the executors was employed merely to pass the title to the corporation. Nothing is said in the will as to the beneficial interest in the property becoming vested in the beneficiaries when the property should be conveyed to the corporation. It became vested in them on the death of the testator, liable to be divested if a corporation should not be organized within a reasonable time under all the circumstances. There is no room for claiming that the property did not vest till the conveyance should be made to the corporation. The charity could not be administered till then, but its administration had nothing to do with the vesting of the property, any more than the possession of property by a devisee has to do with the vesting of the same in him. Reversionary interests vest in a party when the possession of the property is in another. So here, the property became vested on the death of the testator, but the time when the beneficiaries should enjoy the charity was deferred till the corporation should become organized and the property conveyed.

There is nothing in either of these views of the question which conflicts with the case of *Jocelyn v. Nott*, 44 Conn 55, which has been so strenuously claimed. In that case real estate was devised to trustees till some Congregational church, orthodox according to the faith, order and discipline of the Congregational churches of Connecticut, and connected with the general association of the State, should become organized and should build a church edifice upon the land, for the worship of God according to the usages of such church, and till the trustees should become satisfied that the cost of the building had been paid, and the church and society were

free from debt, and permanently established on the land; then the trustees were required to convey the property to the society. The court held the devise void by the statute against perpetuities.

It will be observed that there was no connection whatever between the trustees and any one of the Congregational churches of the State of the order described. They were to hold the property till some one of such churches should comply with the numerous conditions, which the court well said might never occur. The devise was a mere offer of the land, and the trustees were to wait and see whether any one of the churches described would accept the proposition. Clearly, that case is not analogous to the one at bar.

The case of *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, is strikingly like the one under consideration. The devise was there made to trustees to hold the property till an act of incorporation should be passed by Congress, establishing a hospital for foundlings, and then convey the property to the corporation. Justice SWAYNE, in giving the opinion of the court, says: "The testator chose to reach the end in view by the intervention of trustees, and instructing them to convey at the proper time. This provision in the will was therefore a conditional limitation of the estate vested in the trustees, and nothing more. Their conveyance was made necessary to pass the title. The duty with which they were charged was an executory trust. * * * When such uses are consummated, and no longer *in fieri*, the law of perpetuity has no application." See also *Inglis v. Sailors' Snug Harbor*, 3 Pet. 310.

We think the bequest is not obnoxious to the statute against perpetuities.

We think the bequests to the ecclesiastical societies are void by the statute, on the ground that they create perpetuities. A sum of money was bequeathed to each of the societies described, to be invested as a perpetual fund; and the annual income thereof, or so much as should be necessary, applied in keeping in good order certain burial lots, and the remainder of the income, if any, applied to the maintenance of the religious services of the societies. The will then goes on to say that in case the societies should at any time fail to comply with these conditions, in keeping in good order the burial lots, the bequests should become void.

It has been held in numerous decisions, that bequests for the purpose of keeping burial lots or cemeteries in good order or repair,

are not given in charity, and therefore are not protected by the statute of charitable uses.

If the sums of money had been bequeathed to the societies without condition, and the income thereof applied to the maintenance of the religious services of the societies generally, and one of their duties had been the keeping in good order burial lots or cemeteries, then the bequest would have been given to a charity, and would have been protected by the statute of charitable uses.

But the bequests as they are, although some portion of the income is to be devoted to a charitable purpose, cannot be supported. If it were otherwise it would be in the power of an individual to make a perpetuity of property to any extent, by devoting some small portion of the undivided income thereof to some charitable purpose. A little charity, in such a case, cannot preserve the entire bequest.

Neither can the forfeiture clause protect the bequests. There might not be a forfeiture within a thousand years, and during all that time the property, devoted to keeping in order the burial lots, would be a perpetuity, contrary to the statute.

We think the bequest to the Smith Memorial Home is valid; but that the bequests to the ecclesiastical societies are invalid; and so we advise the Superior Court.

In this opinion PARDEE and LOOMIS, JJ., concurred.

CARPENTER, J. I think the legacies to the religious societies were good, and that the duty of keeping in order the lots in the cemetery does not make them void as contrary to the statute against perpetuities or otherwise.

GRANGER, J., concurred in holding that the legacies to the religious societies were void, but dissented as to other points in the opinion.

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(51 Conn. 405.)

Municipal corporation — icy sidewalk.

Where a city sidewalk has become dangerous for travellers by an accumulation of ice, and the city has had ample notice of its condition, and might have rendered it safe by a reasonable expenditure, it is liable for an injury to a traveller by falling thereon, although there was no structural defect in the sidewalk, and the ice was smooth, and the icy condition extended throughout the city. (*See note, p. 48.*)

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ACTION for injury by falling on a city sidewalk. The head-note shows the point. The plaintiff had judgment below.

S. W. Kellogg and G. E. Perry, for appellant.

J. O'Neil and M. Myers, for appellee.

LOOMIS, J. The error assigned in this case requires us to draw the line very closely, limiting the duty and consequent liability of a city to the particular form which the ice on the sidewalk causing the injury is found to have assumed.

At first the contention before the courts was strong, that duty and liability must cease where structural defects ended. This objection was soon brushed away, and the liability of towns and cities was extended to other things having no connection with the structure of the road or walk, but which might obstruct or imperil the traveller.

Then it was contended that snow and ice, coming solely at the will of providence, must surely be beyond the purview of a town's duty relative to its removal, but it was soon generally conceded by the courts everywhere that towns and cities must be held to owe some duty even in regard to ice and snow upon the public streets and sidewalks, but it was insisted that the duty must be restricted to ice found in ridges upon the sidewalk and could not be extended to smooth and level ice however slippery. And here at the outset we concede that there is a strong array of authorities from different States sustaining this position, but they all follow and count upon the leading case in Massachusetts of *Stanton v. Springfield*, 12 Allen, 566, to which we will again refer.

Leaving out of view for the time being as far as practicable the bias of mind produced by the fact that the courts of other jurisdictions sustain the distinction, let us inquire into the substantial reasons that it rests upon. In the first place, it is obvious that it does not depend at all upon the fact that ice in ridges is dangerous, while smooth ice is not. This of course is a question of fact, and should be found as such to make it an element of the legal proposition, but appealing to common knowledge and experience, we think it may be assumed that no such fact could be proved to sustain the distinction, but on the contrary that it might be shown that the smooth and glare ice would be the more dangerous. And

in this connection the finding in *Stanton v. Springfield, supra*, is significant. In that case there was both rough and uneven ice and also places where the ice was entirely smooth. The plaintiff passed safely over the rough and uneven ice, but to use the language of the finding, "fell as she stepped on the smooth ice, which was so slippery that her feet came out from under her the moment she touched it." It seems then that the city escaped liability because the plaintiff happened to fall where the walk was in fact most dangerous. A fall only one step further back would have made it liable. At first blush this seems a little absurd; nevertheless, if the line of responsibility was properly drawn the court faithfully applied the principle, for it would be immaterial how near the plaintiff came to the line if she was really beyond it. So we will return again to consider the reasons on which such a distinction must be based. But the fact that the distinction ignores as a defect that form of ice which may be the most dangerous, remains an objection not easily to be overcome.

It may plausibly be suggested that the ice to constitute a defect must, while adhering to the walk, assume a form which would be a structural defect, if the walk itself was so constructed. If this is correct then mere smoothness of surface could never be a defect, and a sidewalk, though made for the express purpose of enabling travellers on foot to pass safely thereon, might be made of glass or some material so slippery as to defeat the purpose of making it by rendering it impossible for the traveller to pass over it in safety, and yet the law could not regard the walk as defective. The very statement sufficiently exposes its absurdity, but it has been virtually repudiated in Massachusetts in the case of *Cromarty v. Boston*, 127 Mass. 329; s. c., 34 Am. Rep. 381. In this case the plaintiff offered to show that a cover made in part of glass and partly of iron formed a portion of the sidewalk, and had been so changed by wear as to be smooth and slippery, that the plaintiff stepped on it, and slipped wholly by reason of its smoothness, and fell and was hurt. The defendant contended that inasmuch as the general surface of the walk was level, and the cover was level with the rest of the walk, there was no evidence of a defect. The court, SOULE, J., giving the opinion, say: "This position cannot be maintained. * * * If a walk is constructed of material so smooth and hard that travellers shod in the ordinary way are defeated or obstructed in their attempts to pass over it by inability to get the hold upon it

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with their feet which is necessary to their walking forward, or the want of which causes them to lose their balance and fall, such walk cannot be said as matter of law to be safe and convenient. And if in a sidewalk, the chief part of which is in a proper condition for travel, a small part of the surface is constructed of material different from the remainder and so smooth and slippery that a foot traveller stepping suddenly upon it from the portion otherwise constructed, necessarily or probably slips and is liable to fall, it cannot be said as matter of law that such walk is not defective."

But it may be more satisfactory to examine the reasons actually given by the court for its decision in the leading case of *Stanton v. Springfield*, *supra*. It was there held that the mere fact that a highway is slippery from ice upon it, so that a person may be liable to slip and fall upon it while using ordinary care, if the way is properly constructed, and there is no such accumulation of ice and snow as to constitute an obstruction, and nothing in the construction or shape of the way which occasions any special liability to the formation or accumulation of ice upon it, it is not a defect or want of repair which will authorize a jury to find that it is not safe or convenient for travellers within the meaning of the statute. HOAR, J., in giving the reasons, said: "If a city was made liable for this cause it would have to be extended also to country roads, and the same rule would apply to pavements or roads made slippery for horses by snow or ice or even by rain. * * * It could never have been intended by the legislature to impose upon towns and cities of the Commonwealth a responsibility so extensive, or that the phrase 'safe and convenient for travellers' should receive such an interpretation. It would require of all towns an examination of all their roads so incessant and minute, and the application of an efficient remedy would be so laborious and expensive, that it would be manifestly unreasonable to require or expect it. The freezing mist of a single night may glare over the whole territory of a town. The formation of thin but slippery ice in our climate is an effect which may be so sudden and extensive, and which may continue or be renewed for such a length of time, that it would be extremely difficult, if not impossible, for towns to make adequate provision against it."

Notwithstanding this powerful presentation of objections we think the principles heretofore accepted by this court will render the reasoning inapplicable in this State, so far as the case at bar is concerned.

It is contended that if a city is held liable, the same liability must be extended to country towns and country roads. In this State however we have made a marked distinction between cities and towns as to ice and snow. In *Landolt v. City of Norwich*, 37 Conn. 615, SEYMOUR, J., alluding to this point, says: "The peril is not such as to warrant the great expense in a sparsely inhabited village of attempting a preventive or a remedy; but in cities the aggregate of peril by reason of the numbers exposed to it becomes considerable and the means of meeting the needful expense are ample; and hence in cities the public as such properly undertake the duty of doing the best they can to provide against the dangers to travel which winter in this climate necessarily brings. Well cleaned pavements are justly felt to be convenient and necessary." The underlying principle is one and the same, namely, that the care to be exercised by the municipality is a reasonable one, which must take into view all the circumstances, but the result is that the standard of diligence and duty is not necessarily the same in cities as in sparsely settled towns.

Neither can we accept the reasoning that whatever a city must do relative to ice on a sidewalk it must also be required to do with reference to ice in the carriage way. We had supposed the principle obtained everywhere, that all parts of all highways need not be kept in like repair and alike smooth and free from obstructions, and that reference may always be had to the character of the way and the kind and amount of travel over it. *Street v. Holyoke*, 105 Mass. 85; s. c., 7 Am. Rep. 500; *Kingsbury v. Dedham*, 13 Allen, 186.

No person of ordinary prudence would think of driving his horse smooth-shod through the streets in the season when ice might reasonably be expected to be found, and a city or town may reasonably be exempted from the duty of anticipating and providing against the consequences of such imprudence.

The remaining objections are all founded on the assumption that if a city should be made responsible under any circumstances for smooth ice on its sidewalks, it must logically and of necessity be responsible under all circumstances, as well for "the freezing mist of a single night" which glares its entire territory, as for a patch of ice of a few feet only in extent which had existed in the same condition for weeks. That such a conclusion is illegitimate we think might be demonstrated by reference to principles generally

accepted, but it suffices to say that our courts have already decided adversely to this position.

In *Congdon v. City of Norwich*, 37 Conn. 419, SKYMOUR, J., in giving the opinion of the court, says: "When an ice storm covers the entire surface of the earth with ice the public authorities cannot be expected to scatter sand and ashes upon all places of public travel within their limits, * * * but it has become familiar law in Connecticut that some duty in regard to snow and ice devolves upon cities and towns. Accumulation of snow and ice may produce such a condition of the road as to cause it to be dangerous and defective, and in each particular case of alleged defect from such cause the question will depend upon an inquiry of fact, whether under all the circumstances of the case the road was in a reasonably safe condition, and whether those who were bound to keep the road in repair are justly chargeable with negligence and want of reasonable care in relation to it."

If the Massachusetts court could have accepted the distinction above mentioned it is obvious the reasoning referred to would lose all its force. The argument of the learned court may be summarized thus: If a city is liable in respect to any smooth ice it is liable for all, and if liable for all it is a burden too heavy to be borne; there is practically no power to perform it, and where there is no power to do there is no duty to be done. We hold on the contrary that if ice is found on the sidewalks to a limited extent, in a dangerous condition, whether smooth or otherwise, and the city has ample notice of the fact and can with reasonable expenditure make the passage safe for travel, it ought to do it, and is responsible for the consequences if the duty is neglected. But if a sudden ice storm covers all the territory of a town it would be impracticable to apply the remedy, and it would be considered and treated as would an extraordinary inundation of its streets by a flood.

But it may be suggested that we overlook the logic of the Massachusetts court, which is that to make a city liable the street must be found defective, and if a small amount of ice existing for a long time is a defect, so is a large amount coming however suddenly. But it should be borne in mind that the existence of a defect in the street is but one fact among several, all of which are indispensable to impose a liability for an injury caused by such defect upon the city. The latter must be found guilty of some negligence or want

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or reasonable care in regard to the matter. A defect may exist and yet the city or town may not be liable for the injury occasioned by it. To determine this question all the circumstances must be considered. The decision of the case at bar must be understood to refer only to the particular circumstances found by the court, namely, that the place of injury was on one of the principal business streets of the city — that the sidewalks on both sides of that street were in good condition except at the precise place of the accident, which was very dangerous by reason of glare, smooth ice; that it had been in this same condition for a number of weeks prior to the accident and that no sand or other substance had been put upon the ice to make it more safe, as might easily have been done, but it had been permitted by the defendant during all this time to remain in the same slippery and dangerous condition, and that the plaintiff, while in the exercise of ordinary care, slipped and fell upon the ice and was thereby injured.

Our decision is that under such circumstances we cannot say that the court below erred in finding the defendant liable, and this decision we regard as in harmony with all previous decisions by this court and as logically required by the principles heretofore accepted by the court.

In *Duoley v. City of Meriden*, 44 Conn. 117; s. c., 26 Am. Rep. 433, FOSTER, J., giving the opinion, after stating the facts, says: "However the law may be elsewhere as to the liability of cities and boroughs for injuries sustained on account of ice found on sidewalks in their respective limits, we must regard the principles recently enunciated by this court in the case of *Congdon v. City of Norwich*, 37 Conn. 414, as establishing the law of Connecticut and decisive of this case. The law as laid down in *Landolt v. City of Norwich*, 37 Conn. 615, decided by the Superior Court, is also applicable to this case."

After these decisions the law of this State as to a town's responsibility for ice upon its sidewalks was generally accepted by the courts and by the profession as settled and as different from the law of Massachusetts.

In *City of Hartford v. Talcott*, 48 Conn. 532; s. c., 40 Am. Rep. 189, HARDEE, J., giving the opinion of the court, said: "Where ice has accumulated upon the sidewalk to a dangerous extent it is the duty of the municipality to remove or cover it within a reasonable time after its formation."

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But the counsel for the defendant in the case at bar, looking critically into the facts in *Dooley v. City of Meriden*, and *Congdon v. City of Norwich*, discover that the ice in these cases was described as uneven, and therefore insist that the decisions are to be regarded as based on that fact, and so they would make the rule in this State identical with that of Massachusetts. But such is not a true interpretation of those decisions. In both the cases the ice is described as of uneven surface but in some places smooth and slippery, and in neither case is it found whether the plaintiff fell upon the smooth ice or the uneven ice. Upon the Massachusetts distinction it would have been indispensable to the validity of the judgments rendered in both cases for the plaintiffs that it should appear as a fact that the injury was caused by the uneven ice. This court evidently treated that distinction as immaterial, and relied upon the controlling fact that the ice was slippery and dangerous, and had so remained for a considerable time in both cases, and that no sand, ashes or other substance had been placed on the walk to render it less dangerous. In *Dooley v. City of Meriden*, it will be observed that the counsel for the plaintiff in error sought to reverse the judgment obtained in the court below against the city, upon the authority of the same citations from the decisions of other States that the present defendant relies upon, but they did not prevail with the court, and in *Congdon v. City of Norwich*, it appears that the defendant, citing the Massachusetts authorities, claimed specifically, both in the court below and in this court, that there was no defect in the highway, and that in order to make the city liable there must be such a formation of ice and snow as to make an obstacle to travel, and that mere slipperiness of the ice was not sufficient. The court below overruled this claim, found the highway defective, and rendered judgment for the plaintiff, and this court sustained the decision upon the ground that it could not say as matter of law that the facts found did not warrant the conclusion to which the court came. A critical examination of these cases we think will clearly show that this court did not accept the distinction that obtains in Massachusetts and other States between uneven and smooth ice, nor look upon it with favor.

Before leaving this branch of the case we may remark that the latter decisions in Massachusetts evince a tendency to modify somewhat the doctrine as first announced, and mere smoothness of the ice is now recognized as an element of defect when combined with

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unevenness. In *Hutchins v. City of Boston*, 97 Mass. 272, the ice had become uneven and rounded so as to present a narrow surface three or four inches higher in the center of the walk than at the sides. The court below held that this was no evidence of a defect, but the Supreme Court gave a new trial upon the ground that the evidence should have been submitted to the jury, with instructions that the city could be held liable only in case the jury should find that in addition to the smooth and slippery condition of the ice, it was allowed to be in such an uneven and rounded condition on the surface that a person could not walk over it, using due care, without being in danger of falling. And in *Morse v. City of Boston*, 109 Mass. 446, the plaintiff testified that it was purely the slipperiness of the ice and nothing else which made her fall, and that she did not stumble, but she also testified, as did other witnesses, that the ice was glare, hard, hubby, and in ridges, uneven in form but very smooth. The court, CHAPMAN, C. J., giving the opinion, said that the jury were authorized to find that the hubby surface of the ice made its mere slipperiness more dangerous, and the evidence authorized the jury to find the highway defective.

In 2 Thomp. on Neg. 785, the author, after summarizing the doctrine of the authorities relied upon by the defendant, says: "This doctrine manifestly should be taken with some qualification;" and in the notes on the same page he commends the reasoning of SEYMOUR, J., in *Landolt v. City of Norwich*, as excellent, and also highly compliments the charge of DRUMMOND, J., to the jury as given in *Clark v. Chicago*, 4 Biss. 486, which will be found to contain a statement of principles similar to those that have obtained in this jurisdiction.

{Omitting question of notice.]

We advise the Superior Court that there was no error in the judgment of the District Court.

In this opinion the other judges concurred.

NOTE BY THE REPORTER.—See *Pittsburgh Southern Railway Co. v. Taylor*, 104 Penn. St. 306; s. c. 49 Am. Rep. 580.

A statute authorizing a tax for the "support of streets" imposes upon a corporation the duty of, and affords it the means for keeping the sidewalks of such streets free from dangerous accumulations of snow and ice. Snow and ice from time to time slid off the roof of a barn which stood at the edge of a sidewalk, and this caused an obstruction forty feet long and nearly three feet high, extending across the whole width of the sidewalk. This pile

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at both ends descended sharply. It had existed two weeks. It was rather difficult to get upon it and to get down from it. Plaintiff, in the day time, passed over it, but in descending, slipped, there being a light snow on the ground, and was injured. *Held*, that the question of contributory negligence was for the jury. *Pompey v. Saratoga Springs*, 21 W. Dig. 115.

Where snow eight inches deep had lain on the walk two weeks, and then thawed and froze again, and the ice thus resulting continued nearly a week, and plaintiff slipped on it at night and was hurt, *held*, that the jury were warranted in finding the village authorities chargeable with notice and negligent. *Chapman v. Village of Silver Creek*, 20 W. Dig. 253.

On question of notice, see also, 89 Am. Rep. 84, note; 83 Eng. R. 186.

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(51 Conn. 524.)

Negligence — evidence — subsequent precautions.

In an action for injury by negligence in not providing safeguards at a point of danger, evidence that the defendant subsequently put safeguards there is not competent. (See note, p. 58.)

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

R. D. Hubbard and *C. H. Briscoe*, for appellants.

L. E. Stanton, *J. H. Halliday* and *C. E. Perkins*, for respondents.

LOOMIS, J. The main issue of fact in this case was whether the defendant was guilty of negligence in not properly fastening a door in one of its mills opening into a water closet, after the floor had been removed for repairs, by reason of which the plaintiff, opening the door, stepped in and fell to the ground and was injured.

The defendant offered evidence to prove that the door had been securely fastened by strap hinges screwed into both the door and the jamb, so that it could not be opened without violence, and that the plaintiff broke it down after great effort, and so received her injury. The counsel for the plaintiff, in the cross-examination of one of the defendant's witnesses, inquired if boards were not nailed across the casing of the door on the day following the accident to

stop people from going there. To this question the defendant objected, on the ground that the precautions taken after the accident did not show the nature or insufficiency of the precautions taken before, and were not admissions by the defendant that such previous precautions were insufficient. The court however admitted the evidence. In the argument the defendant's counsel again called the attention of the court to this question, and requested the court to instruct the jury that the testimony was not admissible for the purposes mentioned in the objection, but the court did not so instruct the jury.

It will be readily conceded that the negligence to be proved depended entirely upon what the defendant knew and did or omitted to do before the accident. The only possible bearing which the evidence in question could have would be as an admission that the previous precautions were insufficient and negligent. And this presents the question for our present discussion. Can this act subsequent to the accident be made to reflect back and condemn what the defendant had done by way of securing this door before the accident ?

The question obviously has an importance which transcends the exigencies of the present case, for all persons to whose negligence accidents may be attributed will want to know how much in the way of changes and repairs they may afterward do, to prevent the possibility of a recurrence of similar accidents, without admitting their responsibility for the past.

We are not aware that the question has ever been the subject of discussion in this court. We are entirely free therefore to adopt the rule which seems best founded in reason, justice and public policy. But we will first endeavor to obtain what assistance we may by a review of the authorities from other States.

And here we shall find some contrariety of decision and reasoning, but we think there is a decided preponderance of authority in favor of the defendant's claim, that precautions taken subsequent to an accident do not involve an admission that the prior ones were insufficient and negligent. A long line of consistent decisions in the State of New York sustains the defendant's objection to this evidence. In *Dungan v. Transportation Co.*, 56 N. Y. 1 ; 5 Hun. 73, it was claimed that the defendant was guilty of negligence in not sufficiently protecting by a railing a gangway on the defendant's boat, in consequence of which the plaintiff's intestate slipped under the

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railing in attempting to recover his hat which had suddenly blown off, and fell overboard and was drowned. The plaintiff offered to prove that after the accident the defendant boarded up the space under the railing. The Court of Appeals held that this evidence was properly rejected, upon the ground that the question of negligence was to be determined by what was known before and at the time of the accident. In *Sallus v. Del. & Hud. Canal Co.*, 3 Hun, 338, the plaintiff's intestate was killed while employed as a fireman on a locomotive of the defendant which ran into an open frame switch and was overturned. It was claimed that the defendant should have used at the place a target switch, and the court below permitted the plaintiff to give evidence to the effect that after the accident the defendant substituted a target switch for the common one, which was held to be error within the ruling in *Dougan v. Transportation Co.*, *supra*, the court saying that "what the defendants did after the injury was immaterial, unless their acts could be construed as equivalent to their declaration that they were negligent at the time of the injury." The same principle was applied in *King v. Railroad Co.*, 4 Hun, 776, when after the accident repairs and changes were made in a derrick which caused the injury. In *Baird v. Duly*, 68 N. Y. 551; s. c., 15 Am. Rep. 488, the Court of Appeals held that it was error in an action for negligence against the owner of a steam tug for towing a scow at an improper rate of speed, to show that the scow was towed at less speed after the accident than before. In *Payne v. Railroad Co.*, 9 Hun, 526, in an action to recover damages for an injury to the plaintiff's husband, received while passing over a crossing upon defendant's track, the plaintiff was allowed against the defendant's objection to show that shortly after the accident the defendant took up the planks at the crossing and replaced them by new ones; which was held to be error, upon the ground, as stated by LEARNED, P. J., that it would be plainly unjust to the defendants that they should not take additional precautions against accidents without the risks that these precautions should be construed into an admission of prior negligence. See also *Sewell v. City of Cohoes*, 11 Hun, 630, and *Morrell v. Peck*, 24 Hun, 37.

In *Hudson v. Railroad Co.*, 59 Iowa, 581; s. c., 44 Am. Rep. 692, and in *Cramer v. City of Burlington*, 45 Iowa, 627, it was distinctly held that repairing defects after an accident was not evidence as an admission of negligence at the time of the accident. But although

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these decisions are the same in principle as those cited from New York, yet they seem to be placed entirely upon the narrow ground that the acts in question, having been done by agents of the defendant corporations, were not binding on the latter, because not contemporaneous with the injury complained of. But the same court in *Couch v. Watson Coal Co.*, 46 Iowa, 17, where the alleged cause of the injury was the incompetency and carelessness of an engineer employed by the defendant, held that the fact that after the accident the engineer had been discharged by the defendant, was not admissible as tending to show that he was incompetent or careless. There was no question here as to the authority of an agent to bind the defendant. The act of discharging the engineer was conceded to be the act of the defendant. So that in so far as the case is similar in principle to changes and repairs in a structure causing an injury, it is an authority in favor of the defendant. The court put the case on the ground that the discharge did not involve an admission that the engineer was incompetent, as he may have been discharged for a variety of reasons. The analogy of the reasoning to the case at bar would seem to be perfect. The subsequent change and precaution here may also be attributed to a variety of reasons other than the one involving an admission that the previous precautions were in fault.

The only decisions, not now overruled, which we have been able to find to support the claim of the plaintiff as to the evidence in question, are from the courts of Pennsylvania. The first case is that of *Penn. R. Co. v. Henderson*, 51 Penn. St. 315, where the injury (which was the killing of the plaintiff's husband) was alleged to have been caused by the negligence of the railroad company in not having a safe and convenient platform, and not allowing sufficient time to get into the cars, and in causing an engine to run alongside of the cars when passengers were about to get into them. Among other points it was claimed that there was error in permitting the plaintiff to show that the agent of the company, on the morning after Henderson was killed, directed the telegraph operator to telegraph Thomas A. Scott, general superintendent of the road, the situation of the platform, and that he thought it ought to be removed, and that the reply came immediately, "Very well," and that the platform was removed the next day. It was held that there was no error in this ruling, but no reasons at all are given, as the point was not a prominent one in the case. It may perhaps

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be reconciled with the principle of the New York decisions by the fact that the act of removing the platform was characterized by the strong language which the agent used condemnatory of it and the arrangements, which were adopted virtually by the general agent, and that the act was equivalent to saying that the platform ought to have been removed before, or ought never to have been built in the way it was. If so construed it was of course proper evidence. This decision however was followed by two others, where there were no declarations accompanying the act to make it refer back and condemn the previous arrangements, and which it must be conceded cannot well be reconciled with the New York authorities. In *West Chester & Philadelphia R. Co. v. McElwee*, 67 Penn. St. 311, which was an action for death by negligence from cars striking a cart on scales near to a railroad track, it was held that evidence was proper, that after the accident the track was removed to a greater distance. The only reasons given are these by WILLIAMS, J.: "If the evidence tended to show, as suggested, that the track was originally too near the office and shanty to permit the cars to be run on it without danger, then it was evidence of a fact proper for the consideration of the jury in determining whether due and reasonable care had been used by the company to avoid the accident. If the proximity of the track to the buildings did not increase the danger, why was it moved? And if it did, then a higher degree of care was necessary to avoid accident, and in this aspect the evidence was properly received." In *McKee v. Bidwell*, 74 Penn. St. 218, the plaintiff in going about nightfall into the defendant's building on business, fell through an opening into the cellar. It was held that evidence that the defendant afterward put a light at the opening was admissible.

The Supreme Court of Minnesota, at first following the Pennsylvania decisions, held in several cases (*O'Leary v. City of Mankato*, 21 Minn. 65; *Phelps v. City of Mankato*, 23 Minn. 276, and *Kelly v. Railroad Co.*, 28 Minn. 98), that repairs after an accident of a structure the defects of which were the alleged cause of the injury, were evidence tending to show the previous unsafe condition of the thing repaired, provided the repairs or changes were made so soon after the accident and under such circumstances as to indicate that they were suggested by it and were done to remedy the defect which caused it; but on the question coming up again in *Morse v. Railroad Co.*, 30 Minn. 465, decided as recently as June, 1883, the

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court alluding to its previous decisions, said: "But on mature reflection we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."

We may well adopt this reasoning of the Minnesota court as covering the entire ground in a few words. Courts that have taken a different view of this question seem to us to have overlooked the changed conditions under which the acts subsequent to the accident have been done. The fact that an accident has happened and some person has been injured, immediately puts a party on a higher plane of diligence and duty from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than condemn the person so acting. If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence which has no business there, not being in existence at the time.

In the case at bar it is perfectly clear that the act of nailing boards across the door should not be admitted to show previous negligence, even if the rule should not go to the extent that it has been applied in the State of New York. It was conceded that the door to the closet was intended to be closed by the defendant, the only question being whether it was properly done. By the act of the plaintiff, whether it was extraordinary or otherwise, the door was broken down, and after the accident there was nothing to prevent persons from passing through the door; the defendant there-

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fore, in view of this new danger, immediately nailed boards across. If a bridge should be broken down by a heavy load, though the fault was in the load rather than the bridge, no court would think of its being evidence of prior negligence if the party bound to keep it in repair should put a bar across to stop travel, or should rebuild the bridge. The new condition calls for the new act; and so it manifestly did in the case under consideration.

But the plaintiff claims that the subsequent boarding up the door was at least admissible to show that certain of the defendant's witnesses who had testified to the marks of violence seen on and about the door after the accident could not have seen what they described, and she invokes the benefit of the familiar rule, that if evidence is admissible for any purpose its reception furnishes no ground for a new trial; but this rule applies only where it does not appear that the evidence was received for an illegitimate purpose. *Tyler v. Todd*, 36 Conn. 220.

In this case it is very clear that the evidence was received for an illegitimate purpose. The objection to it was specific, and it was not admissible to show prior negligence. The plaintiff, while claiming the testimony, did not in any manner disclaim the purpose attributed, and the courts afterward being asked to limit the scope and effect of the evidence by excluding the purpose named, refused to do so. It is quite certain therefore that the jury must have used the evidence for an improper purpose to the injury of the defendant.

There was error in the rulings complained of, and a new trial is ordered.

In this opinion the other judges concurred; PARDEE, J., being disqualified by interest and not sitting.

NOTE BY THE REPORTER.— See *Martin v. Towle*, 59 N. H. 81. In *Henkel v. Murr*, 81 Hun, 28, it was held that to render the owner of a building, the rooms in which are rented to different tenants, liable for the injuries sustained by a person who while visiting one of the tenants caught her heel in a hole in the oil-cloth laid upon the stairs in the hall, it must be shown not only that the fall was occasioned by the dangerous condition in which the oil-cloth was left, but also that the landlord neglected after having had knowledge or notice of its dangerous condition, to repair the same, or that he omitted to use reasonable means and precautions to ascertain its condition and make the requisite repairs. Also that evidence that some time after the accident the landlord had put new oil-cloth upon the stairs was inadmissible. The court said: "But the question is not one of contract. The liability rests wholly upon actual negligence, in which the duty or obligation of the landlord is only

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an element; a most important one, it is true, but by no means exclusive and controlling. In addition to that element it must appear that with some notice of the condition of things, or under some circumstances equivalent to notice, such as an unreasonable omission to ascertain the condition, he had failed to make the necessary repairs or changes called for by the condition or exigency. It was not enough therefore to find that a hole had come in the oil-cloth in which the plaintiff's heel caught so as to cause the fall which injured her, for in the nature of things all that might occur without just ground to charge the landlord with negligence. * * * Against the appellant's objection and exception it was shown that some months after the accident to plaintiff the defendant had put new oil-cloth upon the stair-case. It has been frequently held that such evidence is not admissible to show knowledge of dangerous condition at the time of the injury. The cases are very decisive on that subject. *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1. 8; *Baird v. Daly*, 68 N. Y. 547; *Salters v. Delaware and Hudson Canal Co.*, 3 Hun, 338; *Morrell v. Peck*, 24 Hun, 27." On the latter point, see, to same effect, *Hudson v. Chicago and North-western R. Co.*, 59 Iowa, 581; s. c., 44 Am. Rep. 692, and note, 694.

In *Sewall v. City of Cohoes*, 75 N.Y. 45; s. c., 31 Am. Rep. 418, defendant had appropriated a strip of land within its limits as a street, had graded, paved and laid sidewalks thereon, and it was used as a public street. Over this land and about ten feet above it was a tramway or bridge, erected and used by private individuals. On the day specified, plaintiff who was driving a team of six horses attached to a wagon of unusual dimensions containing lions belonging to a circus company, turned into such street from another. After the leading horses turned the corner plaintiff did not look to the front but was looking to the rear to see if the hind wheels of the wagon cleared the corner, and so did not perceive the bridge until the second pair of horses were passing under it; he then tried to stop the horses, but before he could do so he was struck by the bridge and injured. In an action to recover damages for the injury, *held*, that it was competent for plaintiff to prove resolutions of defendant's common council as to grading and paving the strip of land in question, and a resolution passed soon after the accident, directing the removal of the bridge, and that the same was removed, as tending to show that defendant exercised authority and control over the strip of land.

In *Searles v. Manhattan Elevated R. Co.*, 49 N.Y. Super. 425, plaintiff while passing under the elevated railway of defendant was injured by a cinder falling from an engine thereon, into his eye. The evidence showed that if the engine were in perfect condition no fire could escape, also that cinders had frequently escaped before, falling into plaintiff's eyes. No explanation of the occurrence was made by the defendant. *Held*, that a verdict for plaintiff should be sustained. Evidence that since the occurrence cinders had not fallen to so great an extent as before was admitted to show that some contrivance could have been adopted to prevent the same from falling. *Held*, no error.

In *Wooley v. Grand Street, etc., R. Co.*, 83 N. Y. 121, a witness was asked by plaintiff's counsel, whether the switch was as high at the time of the trial

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as at the time of the accident; this was objected to and objection overruled. *Held*, no error.

In *Dale v. Del. etc., R. Co.*, 73 N. Y. 468, plaintiff was a passenger in one of defendant's cars; he was seated near an open window, with his elbow on the window-sill; while passing over a bridge his elbow was struck by some substance, and his arm broken. In an action to recover damages for the injury, the grounds upon which negligence was claimed to be imputable to the defendant were, that the bridge, which was a truss bridge of wood, with the truss-work sheathed on the inside with boards, was too narrow for the safe passage of the car, and that it was out of repair, some of the boards lining the truss-work being warped and loose. These positions were controverted by defendant. It appeared that some months after the accident the bridge was removed and replaced by an iron bridge, the trusses of which did not come up as high as the window-sills of the cars, and the change of material left more space between the sides of the new bridge and the track. The court charged the jury that they might "take that fact into consideration in determining whether defendants were not guilty of negligence in allowing the old bridge to remain." *Held*, error.

In an action for negligence caused by the breaking of an elevator chain as bearing on the question of defendant's negligence, plaintiff offered to show that immediately after the accident the chain which broke was replaced by a larger and stronger one. *Held*, that the evidence was properly excluded. *Delaney v. Hilton*, 50 N. Y. *Super.* 341. (*See note*, 44 Am. Rep. 649).

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(51 Conn. 577.)

Reward — claimed by public officer.

A public officer, whose compensation is fixed by law, cannot recover a reward for services rendered within the scope of his official duties.*

APPPLICATION for a determination as to what persons were entitled to a reward offered by the applicant for the detection of a burglar.

W. Hamersley, for applicant.

J. L. Barbour, for claimants.

HOVEY, J. The dwelling-house of the applicant, Dr. Gurdon W. Russell, in the city of Hartford, was burglariously broken and

* To same effect, *Hayden v. Songer* (56 Ind. 42), 26 Am. Rep. 1.

entered in the night of October 13, 1881; and the burglar while in the house committed a violent assault upon a member of the applicant's family.

On the 19th of October, 1881, the applicant, by an advertisement published in one or more of the Hartford newspapers, offered a reward of \$1,000 for information which would lead to the detection and conviction of the party who committed the burglary and assault. And at the criminal term of this court, held on the first Tuesday of December, 1881, one John Thomas was prosecuted upon an information in behalf of the State for the assault, which was alleged to be an assault with intent to murder, and thereof was duly convicted.

The present application, praying for the appointment of commissioners to determine as to the payment of the reward, was thereupon brought; and at the January Term, 1882, this court appointed commissioners as prayed for in the application, and made an order limiting the time within which all persons claiming the reward should present to the commissioners their claims and prescribing the notice to be given of the order. The commissioners having complied with the order so made and having attended to the other duties of their appointment, submitted to this court on the 17th of October, 1882, their report in writing, in which they find that George F. Bill, Frank Ennis and William F. Gunn, policemen of the city of Hartford, obtained and gave the information which led to the detection and conviction of the said Thomas, and that they are entitled to the reward unless the fact that they were, at the time of giving the information and now are in the active employ and service of the city of Hartford as policemen, disentitles them to receive it. It was admitted upon the hearing of the report that the information so given was sought for and obtained by the said policemen during hours allotted to them for rest or on days allowed to them for recreation, when they were not bound, unless called upon by their superior officers, to perform any official duty, and when under the rules established for the regulation of the police department they had a right to be "off duty." And these facts, by agreement of the parties, are to be considered as part of the report and are to have the same effect as if they had been embodied therein.

The question for determination therefore is, whether the fact that the said Bill, Ennis and Gunn were policemen of the city of Hartford, though not bound to perform any service as such at the time

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they sought for and obtained the information for which the reward was offered, precludes them from demanding and recovering the reward.

By the common law no public officer may take any other fees or reward for doing any thing relating to his office, than some statute in force gives him, or such as have been anciently and accustomably taken, and if he does he is guilty of extortion. *Dalt.*, chap. 41; 2 *Burn's Justice*, 261; 1 *Russ. on Crimes*, 208. It seems however that anciently an officer who took a reward which was voluntarily given to him, and which had been usual in certain cases, for the more diligent and expeditious performance of his duty, was not considered guilty of extortion; for without such a premium it would have been impossible in many cases to have had the laws executed with vigor and success. 2 *Bac. Abr.* 453; 2 *Inst.* 210; 3 *Inst.* 149; *Co. Litt.* 368; 1 *Russ. on Crimes*, 208. But it has been held from a very early period that a promise to pay an officer a sum of money for doing a thing which the law will not suffer him to take any thing for, is wholly void, however freely and voluntarily it may appear to have been made. *Roll. Abr.* 16; *Roll. Rep.* 313; 2 *Bac. Abr.* 453; *Batho v. Saller*, *Latch*, 54; s. c., *W. Jones*, 65. And it is now well settled that a public officer whose compensation is fixed, or whose fees are prescribed by law, cannot legally contract for or demand a larger compensation or higher fees, in the form of a reward or in any other form, for services rendered in the line or scope of his official duties. *Bridge v. Cage*, *Cro. Jac.* 103; *Stotesbury v. Smith*, 2 *Burr.* 924; s. c., 1 *Bl.* 204; *Callagan v. Hallett*, 1 *Caines*, 103; *Weaver v. Whitney*, *Hopk.* 13; *Hatch v. Mann*, 15 *Wend.* 44; *Smith v. Whildin*, 10 *Penn. St.* 39; *Gihnan v. Lewis*, 12 *Ohio*, 281; *Stamper v. Temple*, 6 *Humph.* 113; *Pool v. Boston*, 5 *Cush.* 219; *Means v. Hendersholt*, 24 *Iowa*, 78; *Merrill v. Quarles*, 35 *Ala.* 544; *Brown v. Godfrey*, 33 *Vt.* 120; *Davies v. Burnes*, 5 *Allen*, 349. If therefore the services rendered by the said Bill Ennis and Gunn were in the line or scope of their duty as policemen, they are not entitled to the reward. It becomes necessary, under these circumstances, to ascertain what the duties of policemen of the city of Hartford were, at the time or times when those services were rendered. The office of policeman is not known to common law; it is created by statute, and such an officer has and can exercise such powers and such powers only as he is authorized to exercise by the legislature, expressly or derivatively. But a

municipal corporation, with the authority of the legislature, may impose upon its police officers such duties and prescribe such rules and regulations for their conduct and government, not inconsistent with its charter or the general laws of the State, as it may deem fit.

The duties of policemen of the city of Hartford are prescribed by ordinances passed by the court of common council, and by rules and regulations adopted by the board of police commissioners, for the government of the police department of the city, in pursuance of the provisions of the city charter. The ordinances declare that it shall be the duty of policemen to obey such lawful orders and directions as they shall receive from time to time, from their superior officers; to guard the city day and night; to report to the chief of police, through the captain of police, all violations of any law of the State or of the city ordinances. all suspicious persons, all houses of ill-fame, all brokers' shops and shops for the purchase and sale of second-hand articles, all gaming houses, and all disorderly and suspicious places of resort; to preserve the public peace, serve criminal process and arrest, without previous complaint and warrant, all persons guilty of criminal offenses, when such offenses shall be committed within the jurisdiction of the police court, and when the offenders are taken and apprehended in the act or on speedy information of others; to render all possible assistance to the ministers of the law; and to do many other acts and things not necessary for the purposes of this case to be enumerated. And by the rules and regulations adopted by the police commissioners for the government of the police department of the city, every member of the police force is bound to give his whole time and attention to the business of the department and must not follow any other calling or business. He is required, during the night season, to examine carefully all the doors, gates and low windows on his beat where in his opinion extra care is needed, and see that they are properly secured. He must, if possible, fix in his mind the appearance and ascertain the names and business of persons whom he frequently meets in the streets late at night, and if he notice any thing suspicious in their behavior, must report the same to the chief of police. He must strictly watch the behavior of all persons of known bad character, especially recollecting the time and place of their appearance on his beat and the places, if any, visited by them, and take notice of and report any thing suspicious that may occur upon his beat. He must constantly use his exertions to prevent the commission of

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crimes and misdemeanors and enforce the law for the protection of person and property during the time given him for rest the same as during his regular hours of duty ; and although certain hours are allotted to him for ordinary duty, he must at all times be ready to act when called upon. For services rendered in the performance of these duties each policeman is entitled, by the city ordinances, to receive pay from the city treasury at the rate of one thousand dollars per annum, payable monthly ; and he is not allowed, but is expressly forbidden by the ordinances, to demand, accept or receive any other compensation, or any present or reward, except in cases where he is detailed by the chief of police to render services for parties other than the city of Hartford and citizens of the same, when the crime has been committed within the limits of the city ; and in those cases he is allowed to receive only such sums as are fixed by the board of police commissioners ; and the sums received he is required to pay over to the secretary of that board.

There is no provision in the ordinances of the city or in the rules and regulations of the police commissioners which, in express terms, makes it the duty of policemen, after a crime has been committed within the city limits, to make inquiry or search for evidence or information which will lead to the detection and conviction of the criminals. The chief or captain of police may however by an order or a direction to the policemen for the purpose, require them to perform that service and make it their duty to perform it ; and the duty arises by implication from that provision in the city ordinances which requires all policemen to render to ministers of the law all possible assistance, as well as from other provisions and the general objects and purposes of the police department.

The duty of inquiring into charges of crime, preferred against persons committed to the station house in the city, is specially devolved upon the chief of police, and in case of his absence or disability, upon the police captain ; and when both are absent or under disability, upon the lieutenant of police. The chief is also required to receive from any subordinate member of the police force and from every other person all complaints of violations of any law of the State or ordinances of the city, and see that the same be prosecuted according to law ; clearly implying that policemen are to inquire into cases of crime which come to their knowledge, obtain such information respecting them as they can consistently with the duties, if any, which are

specifically assigned to them, and communicate the information so obtained to the chief, so that he may prosecute the guilty parties or cause them to be prosecuted according to law. In cases of crime generally, especially cases which come to the knowledge of any grand juror of the town of Hartfield, the duty of making the necessary inquiry and complaint is devolved upon him under the General Statutes; and in those cases, the grand juror, being a minister of the law, has the right to call upon policemen to assist him in the performance of his duty; and the policemen, when called upon, are bound to render him all possible assistance.

But it does not appear from the report of the commissioners that the claimants Bill, Ennis and Gunn were called upon, either by the chief, captain or lieutenant of police or by any grand juror, to render them, or either of them, assistance in obtaining the information for which the reward was offered. They entered upon the service voluntarily, and performed it successfully, at times given them for rest or allotted to them for recreation, and when they had a right, if they choose, to be "off duty," and consequently were under no obligation to perform any official duty. And they claim that under those circumstances the service they rendered was performed in their individual capacity, not as members of the police force, and that they are therefore entitled to receive the reward. But the claim finds no support in the ordinances of the city or in the regulations of the board of police commissioners, but is in direct hostility to the letter and spirit of both. And the claimants referred to no authority in support of the claim. There are cases in which it has been held that it was not against public policy to allow police officers to receive rewards for information that led to the conviction of parties for crimes committed within the precincts of those officers, because it was no part of the duty of such officers in those cases to search for, and if possible to obtain such information. Those decisions therefore are not sufficient to sustain the right of the claimants to recover in the present case, and would not be, if the obstacles created by the ordinances of the city of Hartford and the regulations of its board of police commissioners were removed. And no case can be found—at least, I have not been able to find any—in which the claim of a public officer to receive a reward for services rendered in the performance of his official duties has received the sanction of a court of last resort, in this country or in England.

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In the case of *England v. Davidson*, 11 Ad. & El. 856, the defendant, whose mansion house had been feloniously entered, offered, by a hand-bill, placard or an advertisement, a reward of fifty pounds to whoever would give such information as should lead to the conviction of the felon. The plaintiff, who was a constable and police officer of the district in which the defendant's house was situated, obtained and gave such information as led to the conviction of the person who committed the felony. The defendant paid to the plaintiff five pounds and five shillings, part of the reward offered, but refusing to pay the residue, was sued by the plaintiff, in an action of assumpsit, to recover it. The defendant pleaded to the action that the plaintiff, at the time the felony was committed and when he obtained the information for which the reward was offered, was a constable and police officer of the district where the felony was committed, and that it was his duty as such constable and police officer to give every information which might lead to the conviction of the felon without any payment or reward; and the plaintiff demurred to the plea. Counsel for defendant in arguing the demurrer claimed that no consideration was shown on the record for the defendant's promise to pay the reward; that the plaintiff was bound to do that the doing of which was stated as the consideration — the duty of a constable being to do his utmost to discover, pursue and apprehend felons — and that the contract declared on was against public policy. Counsel for the plaintiff suggested that as constable the plaintiff was not bound to procure evidence. The court, adopting apparently this suggestion, overruled the demurrer and gave judgment for the plaintiff. Lord DENMAN, C. J., in giving the opinion of the court, said: "I think there may be services which the constable was not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against public policy unless the grounds of so deciding were very clear;" and LITLEDALE, PATTESON and COLERIDGE, JJ., who sat with the chief justice in the case, concurred in this opinion.

In the case of *City Bank v. Bangs*, 2 Edw. Ch. 94, the banking house of the plaintiffs in the city of New York having been entered and a large sum of money stolen therefrom, a reward was offered for the apprehension of the thief and the recovery of the stolen money. The sheriff of the county, his son and a third person, who were public officers attached to the police department, acting upon

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information given them by defendant Bangs, found the stolen money and apprehended the thief. The defendant Bangs claimed the reward on the ground that he had given the information that led to the discovery of the thief and money, and the officers claimed it on the ground that they had found the money and restored it to the plaintiffs and had apprehended the thief. The court held that Bangs was entitled to the reward; but in giving the reasons for the decision, the vice chancellor referred to the claim of the officers and made the following observations upon it: "Their" (the officers) "general duties as such, are to arrest persons chargeable with offenses of a criminal nature and to bring them before a magistrate for examination. They are also to search for stolen property, and when discovered to take possession thereof, with a view to its being restored to the rightful owner. For their services in the discharge of such duties they are entitled to a stated compensation or to certain fees allowed by law. It has been contended that public officers ought not to be permitted to receive gratuitous rewards because they are bound to a prompt and vigilant discharge of their duties without the hope or expectation of being thus compensated; the policy of the law, which has in view the safety of the community, is said to be against it; and self-interest, if they are allowed to participate in rewards as a remuneration for services, will cause them to be indifferent and even remiss, until prompted by what they themselves may deem a sufficiently liberal offer; so that no active exertion will be made to arrest felons or to recover stolen property without an incentive of this sort. There is considerable force in this argument; and some illustrations have been given which show how the practice of allowing public officers to participate in rewards may lead to abuse. Still I am not prepared to say they should be entirely excluded. Rewards are offered only when it is supposed the ordinary means of discovery and detection would prove ineffectual. They are voluntary offerings, and adapted to what the party making the offer deem to be the necessity and urgency of the occasion. The object is to awaken public attention to the subject, excite vigilance and call forth extraordinary individual efforts for the accomplishment of the end proposed to be gained. All who choose to engage in it are at liberty to do so; and he who succeeds becomes entitled to the reward upon the ground of his superior vigilance or sagacity, or his having used greater exertions or encountered dangers which others were disinclined or not in a situa-

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tion to hazard. When therefore we view the object of rewards, offered thus publicly, in their true light, a participation in their benefits or in the receipt of them cannot be considered wholly incompatible with the duties of public officers or against the policy of the law."

In the case of *Smith v. Whildin*, 10 Penn. St. 39, the court, after stating it to be the duty of constables to pursue, search for and arrest offenders against whom criminal process is put into their hands, observes that "there are things which a constable is not officially bound to do, such as to procure evidence and the like, and for this perhaps he may be allowed to contract." But the court adds: "And this is the full extent of the principle in the case cited from 11 Ad. & El. 856. But it has been held that even a sailor cannot recover for extra work in managing the ship in peril, the sailor being bound to do his utmost, independently of any fresh contract. *Stille v. Myrick*, 2 Camp. 317, and the cases there cited. It would open the door to profligacy, chicanery and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract; it would also open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecutions. It ought not to be permitted. Constables must do their utmost to discover, pursue and arrest offenders within their township, district or jurisdiction, without other fee or reward than that given by the law itself."

In *Smith v. Moore*, 1 Man. Gr. & Scott, 438, which was an action of assumpsit to recover a reward of twenty pounds publicly offered by the defendants to any person who would give such information as should lead to the apprehension and conviction of the party or parties who had broken into, robbed and set fire to the defendants' premises, the plaintiff, who had been a constable belonging to the police force of the county in which the premises were situated, but who was under a temporary suspension from his office, suspecting a man named Bridges to have been concerned in the robbery, apprehended him, and thereupon he volunteered to make some disclosures relative to the affair if something were given him to eat and drink. Meeting with a sub-inspector of the police force, the plaintiff communicated to him what Bridges had proposed. The sub-inspector thereupon went with the plaintiff and Bridges to a neighboring public house, where the latter having been provided

with refreshment, made a voluntary confession as to the share he had had in the perpetration of the crime, which resulted in his conviction. The jury, under the instructions of the court, returned a verdict in favor of the plaintiff for the amount of the reward and a rule for a new trial was refused.

In *Neville v. Kelly*, 12 Com. Bench (N. S.) 740, the defendant had caused to be published an advertisement stating that certain property had been stolen by a boy aged fourteen years, a description of whom was therein given, and offering a reward of ten pounds to whoever would give such information as would lead to a recovery of the property and the apprehension of the thief. The plaintiffs, who were policemen of a certain district, before the advertisement was published apprehended the boy in that district, having in his possession the stolen property, and upon information given by the plaintiffs, he was subsequently convicted of the theft and the property was recovered by the defendant. The plaintiffs thereupon demanded payment of the reward of the defendant, and upon the latter's refusal to pay it sued him in an action of assumpsit for its recovery. The defendant pleaded, first, that he did not promise as alleged in the plaintiff's declaration; second, a denial that the plaintiffs gave such information as led to the recovery of the property and the apprehension of the thief; third, that before the advertisement offering the reward sued for was published the plaintiffs apprehended the boy who stole the property and kept him in custody until after the publication of the advertisement; and that although the plaintiffs were informed, before the publication that the boy had absconded with the property from the service of the defendant, and knew where the defendant was to be found, they neglected, contrary to their duty, to inform him of such apprehension, and the defendant in ignorance of the apprehension published the advertisement. The plaintiffs replied to the third plea, that before and at the time of the apprehension of the boy they were policemen of a certain district named, and that they apprehended the boy within that district in pursuance of their duty as such policemen, informed the chief superintendent of the police of what they had done, and of all the circumstances which had come to their knowledge concerning the theft, within a reasonable time; that the superintendent of police, in consequence thereof and at their request, informed the defendant within a reasonable time and after the publication of the advertisement. that the boy had been

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apprehended by the plaintiffs; that such information could not reasonably have been given by the plaintiffs to the said superintendent before it was given, and could not reasonably have been given to or received by the defendant before it was given and received, or before the publication of the advertisement; that according to the rules of the police department it was the duty of the plaintiffs, as policemen, to inform the said superintendent of the apprehension of the boy, and that it would have been contrary to their duty and a disobedience of those rules if they had informed the defendant thereof except through and by the said superintendent, and that it was the duty of said superintendent to give that information to the defendant; and that the plaintiffs and said superintendent performed their duty in the premises and did not act contrary thereto. To this replication the defendant demurred, and in support of the demurrer he claimed, among other things, that there was no consideration to support the promise to pay the reward. But he did not rest this claim upon the ground that it was against public policy to allow a police officer to contract or sue for a reward, but solely upon the ground that the plaintiffs did nothing in consequence of the advertisement of the defendant, as the thief was already in custody. The court overruled the demurrer, but the issue of fact was not tried, as the defendant had become insolvent.

In the case of *Bent v. Wakefield & Barnsley Union Bank*, L. R., 4 C. P. Div. 1, one Glover, a shoddy and mungo dealer, absconded from the place where he carried on his business, after committing various forgeries on several manufacturing firms, and the defendants, by a published hand-bill, offered a reward of two hundred pounds to any person or persons giving such information to either of two superintendents of police named as would lead to his apprehension. A few days after the publication of the handbill Glover presented himself at a police office and inquired for the plaintiff, who was the chief constable of the place where the police office was situated, and on the appearance of that officer, said to him: "You hold a warrant for me; I am wanted for forgery." The plaintiff asked his name and who he was, and he replied: "You know already and hold the warrant." After some further conversation the plaintiff searched the police gazette and finding the name "William Glover, wanted for forgery," got him to take off his hat and satisfied himself that he was the man that was wanted. He then telegraphed to one of the superintendents mentioned in the

defendants' handbill, asking him if he held a warrant for the apprehension of Glover for forgery, and received a telegram in reply that he still held such a warrant and should like to have Glover apprehended. And upon that the plaintiff apprehended him, and he was ultimately convicted. The plaintiff afterward brought an action against the defendant to recover the reward. Upon the trial of the action the defendant set up two defenses; first, that Glover himself, and not the plaintiff, had given the information for which the reward was offered; second, that on grounds of public policy the plaintiff was not entitled to recover the reward. The first defense was sustained by the court. But in respect to the second defense the judge who tried the cause said: "On the question of public policy I am bound by the case of *England v. Davidson*, so far as the judgment in that case extends, and although there may be some distinction as to this point between that case and the present, yet in deciding a case on the ground of public policy, the decision should be based on some broad principle and one capable of general application. I am unable to see any general principle other than that argued in *England v. Davidson*, namely, that a constable is bound by his duty, the duty of his office, to seek for criminals and to use his utmost efforts to bring them to justice. There are strong arguments of expediency, touching the administration of justice and the interest of the State, why constables should not be allowed to receive rewards. The expectation of rewards would offer great temptation to delay an active search, by which delay the criminal might escape, or in a case like the present, to delay taking into custody a criminal who gives himself up, so that the constable might appear to use exertions to procure complete information, and for that to claim the reward. There would also be a temptation, particularly to those constables in the detective service, to look to bribes or to seek promises of reward from persons anxious to recover their property, and unless such were offered to be inert in their efforts. But although the judgment in *England v. Davidson* does not enter upon those questions, I must assume that they were present to the minds of the judges who decided that case. Whatever my own opinion may be, it seems to me that I cannot, without oversubtle refinement, apply to this case any general principle of public policy which is not involved in that case, and that the decision, if it is to be reviewed, must be reviewed in a court of appeal."

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In looking at the case of *City Bank v. Bangs*, one of the cases to which I have referred, it will be noticed that the observations of the vice-chancellor in the course of his opinion, so far as they appear to be favorable to the right of the claimants to recover in the present case, were made upon the strength of a decision of the Supreme Court of the State of New York in the case of *Hatch v. Mann*, 9 Wend. 262, in which it was held that an officer whose duty it was to serve process might recover compensation over and above the fees allowed by law, when on a promise of a reward, he uses extraordinary efforts beyond those which an officer is strictly bound to make or which could legally be required of him. But that decision, having been reversed by the court for the correction of errors, as appears from the report in 15 Wend. 44, the force of the observations of the learned vice-chancellor is greatly weakened, if not totally destroyed.

In the case of *England v. Davidson* the court did not intend to abrogate or impair the just and wholesome rule already stated, that a public officer whose compensation is fixed or whose fees are prescribed by law, cannot legally contract for or demand a larger compensation or higher fees, in the form of a reward or in any other form, for services rendered in the line or scope of his official duties. And I cannot presume that the learned judge who presided at the trial of *Bent v. Wakefield & Barnsley Union Bank*, and whose opinion was controlled by the decision in *England v. Davidson*, had any such intention. The courts, in both cases, notwithstanding the expressions used in that opinion, intended to go no further than to hold that a police constable or other police officer, though bound to search for and arrest offenders against whom criminal process is put into his hands, and to do with the offenders when arrested what the process commands, is not bound to search for and procure evidence or information which will lead to their conviction of the offenses, which they are charged. These cases therefore cannot, nor can the other English cases referred to, be made the basis of a judgment in favor of the claimants for the reward sought to be recovered in the present case. But the claimants must recover, if at all, upon the ground that in obtaining and giving the information for which the reward was offered, they acted as private individuals and not within the line or scope of policemen's duty; and that they have the same right to demand and recover the reward as private individuals would have had for

rendering the same service. They cannot however maintain their right to recover upon that ground. For although they performed the service for which the reward was offered at times given them for rest or recreation, they were nevertheless policemen of the city, and as such were drawing pay from the city treasury, for the whole time, at the rate of one thousand dollars per annum. They were not bound to perform the service during those times, because they were excused from the performance of any official duty on all such occasions unless thereto required by the chief of police; but the service performed was in the line of policemen's duty, and having volunteered to perform it, they cannot be permitted to say that they did so as private individuals, but must be deemed to have acted as policemen of the city in assisting the ministers of the law upon whom the duty specially devolved. But if the service has not been in the line or scope of policemen's duty, the claimants would have had no right, but were forbidden by the city ordinances, to contract for or undertake its performance for pay, hire, reward, or compensation of any kind whatsoever, or to demand, accept or receive any compensation or reward for the service when rendered. Under these circumstances, it would be manifestly against public policy as well as in violation of the ordinances of the city, to allow them to receive the reward.

These views, so far as they relate to the question of public policy, are fully sustained by the decision of the Supreme Judicial Court of Massachusetts in the case of *Davies v. Burns*, 5 Allen, 349. That was an action to recover a reward offered by the defendants, who were the owners of a line of steamships plying between a European port and Boston, for information of goods smuggled or intended to be smuggled therefrom. One of the ships, called the *Canada*, arrived, soon after the reward was offered, at her wharf in East Boston, in the night time. The plaintiff, who was a day inspector duly appointed under the laws of the United States regulating such officers, was not assigned to this ship at that time (four other inspectors having been so assigned, which was the complement required), but was as a day inspector to another vessel. It was no part of the ordinary duty of a day inspector at that time to take charge of vessels in the night time or to give information of smuggling to the agents or officers of the defendant's ships. The plaintiff went on board of the *Canada* upon her arrival and his attention was attracted by the conduct of three of the passengers

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whom he examined; and he found concealed upon their persons and in their luggage a quantity of dutiable goods of the value of more than \$400, which were not entered on the ship's manifest. These goods were secured until the next day, when they were seized by the chief inspector assigned to the ship. In the morning of that day, and before any legal process had issued against the goods or passengers, the plaintiff gave information to the defendants' agent of the facts and informed him that he should claim the reward. The passengers who had concealed the goods were afterward, on the same day, arrested; and subsequently they were tried and convicted for smuggling, and the goods were forfeited. The defendants, refusing to pay the reward to the plaintiff, were sued by the latter in this action for his recovery. But the court gave judgment for the defendants. HOAR, J, in giving the reasons for this decision, after expressing a doubt whether the facts brought the case within the offer of the reward, says: "But upon the broader ground of public policy, the plaintiff cannot maintain his action. At the time he found the smuggled goods he was an officer of the customs of the United States, and although not in discharge of a specific duty assigned him, was acting in the service of the government as a volunteer, in assisting the inspectors who had charge of the steamer, and upon whom the charge of examining the passengers and their baggage devolved. His only right to be present and interfere with the passengers at all was by virtue of his official position. He acted as a revenue officer, and so acting, it was his duty to detect, if possible, and expose any violation of the revenue laws, without other compensation than that which attached to his office." The learned judge concludes by saying: "It is against public policy to allow a man to receive a reward for doing his duty as a public officer; and upon the facts agreed there must be judgment for the defendants."

If the law were otherwise, and especially if it were as the claimants in the present case seem to suppose, any police officer of a city, who, while "off duty," should discover an incendiary setting fire to a building, or a burglar breaking and entering a dwelling house, or any wicked and evil disposed person committing a felony of any other kind within the city limits, would be entitled to demand and recover a reward, if one had been previously offered by the city or by individuals, for the apprehension of the felons, or for information which would lead to their apprehension, or to their

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detection and conviction, on complying with the conditions of the reward, notwithstanding the compensation paid to such officer from the city treasury for the performance of his official duties. And upon the same principle a policeman might, without breach of official duty, withhold from his superior officers the information so obtained because it was obtained while he was "off duty," and might thus shield criminals of the worst description from prosecution and punishment. Such a principle cannot receive the sanction of a court of justice. A policeman, who whether on duty or off duty, obtains within the territorial jurisdiction of the police department information which will lead to the conviction of perpetrators of crime therein, is bound, without other compensation or reward than that given by the law, to communicate it to the chief of police or the officer acting in his position, in order that the criminals may be prosecuted and be made to suffer the penalties due to their crimes. To withhold such information would be a flagrant breach of duty and should subject the delinquent policeman, if to no greater punishment, to summary expulsion from office.

The conclusion is, that the contract upon which the claim of the said Bill, Ennis and Gunn is founded was in violation of the ordinances of the city of Hartford and against public policy. It necessarily follows that the said claimants are not entitled to the reward offered by Dr. Russell, and cannot have judgment for its recovery.

CASES

IN THE

SUPREME COURT

OF

INDIANA.

PENNSYLVANIA COMPANY V. WHITLOCK.

(99 Ind. 14.)

Negligence — proximate and remote cause — fire.

The defendant having accidentally but negligently set his own building on fire, the flames were carried by the wind to the plaintiff's building and consumed it. *Held*, that defendant was not liable. (*See note, p. 81.*)

ACTION for negligent injury by fire. The opinion states the case. The plaintiff had judgment below.

J. Brackenridge and J. R. Carey, for appellant.

T. J. Merrifield and J. D. McLaren, for appellee.

NIBLACK, J. Complaint by Robert Whitlock against the Pennsylvania Company in two paragraphs.

The first paragraph charged that the defendant was a railroad corporation, and as such was, and had been for the five years then immediately preceding, operating, managing and controlling the Pittsburgh, Fort Wayne and Chicago railway, running through the county of Laporte, together with all the depots, station-houses

and other property appertaining to said railway; that for a long time prior to the 9th day of January, 1875, the defendant kept, maintained and controlled a station-house on the line of said railway at the town of Wanatah, in said county of Laporte, for the accommodation of passengers and for convenience in the transportation of freight, using also a part of the same for the ticket and telegraph offices; that said station-house was, during all the time named, under the immediate charge of an agent and servant of the defendant, who caused the same to be heated with a large wood-burning stove, the pipe of which ran into a flue in the building which had been so carelessly, negligently and unskillfully constructed as not to prevent the escape of sparks and flames through the sides thereof, and which was, and had been, maintained in such an unsafe and dilapidated condition as to greatly endanger such station-house and property adjacent thereto, of all which the defendant had notice; that the defendant, so having notice of the unsafe and dangerous condition of said flue, refused to repair the same; that the plaintiff was, at the time herein above stated, the owner, and in the actual occupancy, of a large two-story frame hotel building, in said town of Wanatah, of the value of \$6,000, and of furniture and other personal property used in said hotel building of the value of \$2,000; that said hotel building was next and adjacent to the south-west corner of said station-house, with only a small as well as a clear and unobstructed space between the two buildings; that on said 9th day of January, 1875, said station-house caught fire from and through the cracked, unsafe and dilapidated flue so constructed therein, as above set forth, and was thereby totally consumed; that while said station-house was burning, fire was communicated therefrom by the wind to the hotel building, whereby said latter building, with the furniture and other personal property therein contained, was also burned up, and wholly destroyed, without any fault or negligence on the part of the plaintiff.

The second paragraph contained substantially the same facts as the first, except that it charged that the defendant's servants and employees were in the habit of pouring oil on the kindlings and wood put in the stove as fuel, thus making quickly hot and blazing fires, which habit was fully known to the defendant, and that on the morning of the said 9th day of January, 1875, the defendant, by its servants and employees, negligently and carelessly made a

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quick, hot and blazing fire in the stove in the station-house by pouring oil over the kindlings and wood put therein, from which fire sparks and flames escaped through the cracks in the flue into which the stove-pipe entered, thus setting the station-house on fire and burning it up, and that while the station-house was so burning up, fire was blown by the wind from the same to, on and against the plaintiff's hotel buildings, setting fire to it, also in that way, and consuming it and the furniture and other personal property used therein.

Demurrers were severally overruled to both paragraphs of the complaint, and issue being joined, the plaintiff obtained a verdict and judgment against the defendant for \$3,000.

In the natural order of objections made to the proceedings below, the question of the sufficiency of the complaint is first presented. It is claimed that the facts averred in both paragraphs of the complaint disclosed only a case of the accidental burning of the station-house, and of the accidental spread of fire to the hotel building, from which it must be inferred that the negligence charged was not the proximate cause of the injury complained of.

It is not easy at all times to determine what are really proximate and what are only remote damages. That we must so use our own as not to injure another is an ancient and axiomatic rule of the law, but it is often found to be very difficult and perplexing to make a just and reasonable application of this most excellent general rule. There must be some limit to the extent of liability for injuries even in cases of the grossest and most inexcusable negligence. In close cases however it is frequently very hard to determine just where the line between liability and non-liability for seeming negligence ought to be drawn.

The damages for which a party is, and upon principle ought to be liable, are those which are the natural or necessary consequences of his wrongful act. But where some other agency intervenes and extends the injurious effects of the wrongful act beyond the range of its natural or necessary consequences, and beyond what could ordinarily have been anticipated, the party originally at fault is not responsible for such additional injurious effects.

As incidental to the improvements of the age in which we live, and to the vast amount of combustible material in daily use by the people of this country, injuries by fire have been the subject of much judicial investigation within the past few years, and have be-

come a subject about which much has been recently said and written. As applicable however to the particular question now before us, the authorities are not numerous, and some of the cases which have been brought to our attention are not in harmony with each other. This want of harmony is however mainly between the older cases on the one side, and the more modern cases on the other, the tendency all the while having been toward either a non-liability or a more restricted liability, for merely accidental fires.

By the common law of England, before the enactment of any statute on the subject, a person in whose house a fire originated, which afterward spread to his neighbor's property and destroyed it, was compelled to make good his neighbor's loss by the fire. But by a statute of 6 Anne, chap. 31, amended and substantially re-enacted by another statute of 14 Geo. III, chap. 78, § 86, it was provided "That no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall, after the said 24th day of June [1774], accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom, to the contrary notwithstanding."

Blackstone, in his Commentaries, after referring to an ancient common law doctrine on the subject of accidental fires, says: "But now the common law is, in the former case, altered by statute 6 Anne, chap. 3 [31], which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servants' carelessness." 1 Cooley's Bl. Com. 431.

In the case of *Lansing v. Stone*, 37 Barb. 15, it was held that the common law of England on the subject of accidental fires, as modified by the statutes of 6 Anne and 14 Geo. III, *supra*, had become the common law of the State of New York, and, quoting Blackstone as above approvingly, further held that where a man's house or other building takes fire, even by his own or his servants' negligence, and the fire spreads to and consumes his neighbor's property, he cannot be made liable for the latter's loss, upon the theory that the interest which a man has in preserving his own property ought to be considered a sufficient guarantee, as it is in fact the only one his neighbors have against his and his servants' negligence.

The case of *Ryan v. New York C. R. Co.*, 35 N. Y. 210, was a

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more recent New York case. The facts upon which that case rested were briefly, that the railroad company, either by the carelessness of its servants, or through the bad condition of one of its locomotives, set fire to one of its own woodsheds in the city of Syracuse, which sheltered and contained a large quantity of wood. The plaintiff's house, standing at a distance of about one hundred and thirty feet from the shed, took fire from the sparks and heat thrown out by the burning shed and wood, and was thus entirely consumed. A considerable number of other houses and buildings were burned and destroyed by the spreading of the same fire. Upon proof of these facts the Circuit Court nonsuited the plaintiff, and the judgment was affirmed at the General Term of the Supreme Court of the proper district. The cause was then taken to the Court of Appeals, where the judgment was again affirmed by the unanimous, as well as exhaustive opinion of that court. The statutes of 6 Anne and 14 Geo. III, *supra*, were not referred to or relied upon in that opinion, but the conclusion reached was based upon the inference that the railroad company's negligence was only the remote, and hence not the proximate cause of the plaintiff's loss.

HUNT, J., delivering the opinion, and first giving some illustrations, said: "So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed. *Field v. N. Y. Cent. R.*, 32 N. Y. 339. Thus far the law is settled and the principle is apparent. If however the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case. Where then is the principle upon which A. recovers and Z. fails?"

The answer which then followed to the inquiry thus suggested was that in A.'s case the damages would be proximate, while in the case of Z. they would only be remote.

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The case of *Pennsylvania R. Co. v. Kerr*, 62 Penn. St. 353; s. c., 1 Am. Rep. 431, was an action by Kerr against the company for the loss of his furniture in a hotel near the Pennsylvania railroad, which was destroyed by fire through the alleged negligence of the company's servants in running its locomotive. The fire was first communicated to a warehouse and from that to the hotel. The verdict and judgment were in favor of the plaintiff, but upon an appeal, the Supreme Court of Pennsylvania held that the damages were too remote, and referring to, recognizing and approving the distinction observed between proximate and remote damages, in the case of *Ryan v. New York C. R. Co.*, *supra*, reversed the judgment. Weeks on *Damnum Absque Injuria*, at § 118, states the accepted doctrine to be, that where by the negligence of another, a building was burned, and the fire spread to and destroyed an adjoining house, the negligence was considered too remote to give the owner of the latter house a remedy for his loss against the party by whose negligence the fire originated. He then quotes from the case of *Morrison v. Davis*, 20 Penn. St. 171, as sustaining that doctrine, the following: "There are often very small faults which are the occasion of the most serious and distressing consequences. Thus a momentary act of carelessness set fire to a little straw, and that set fire to a house, and by an extraordinary concurrence of very dry weather and high winds, with this fault, one-third of a city (Pittsburgh) was destroyed. Would it be right that this small act of carelessness should be charged with the whole value of the property consumed?" And continuing, says it has also been asked, "should the careless act of the woman who originated the great fire at Chicago make her liable in damages for all the losses that resulted therefrom?"

Field, in his work on the Law of Damages, at § 50, states the doctrine on the subject of spreading fires in substantially the same language used by Weeks, and given as above.

Cooley on Torts, at page 76, says: "How far one may be chargeable with the spread of a fire negligently started by himself, is one that has attracted no little attention in judicial circles and led to some difference of opinion. In New York it is held that while the culpable party would be liable to the owner of an adjoining house to which the fire had spread, he would not be liable to one to whose house the fire should spread from the burning of the first; the court apparently being more influenced in their decision by the

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fact that the opposite doctrine would subject to a liability against which no prudences could guard, and to meet which no private fortune would be adequate, than by a strict regard to the logic of cause and effect. In Pennsylvania the same conclusion has been reached and from similar considerations. But a different view prevails in England and most of the American States. The negligent fire is regarded as a unity; it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though if it had been stopped on the way and started anew by another person, a new cause would have thus intervened back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or nearness in time."

The cases of *Ryan v. New York Cent. R. Co.*, *supra*, and *Pennsylvania Co. v. Kerr*, *supra*, are cited as sustaining the doctrine recognized in New York and Pennsylvania respectively, but the learned author expresses the opinion in a note that the weight of these cases is somewhat diminished by the more recent cases of *Oil Creek, etc., Ry. Co. v. Keighron*, 74 Penn. St. 316; *Pennsylvania R. Co. v. Hope*, 80 Penn. St. 373; s. c., 21 Am. Rep. 100; *Webb v. Rome, etc., R. Co.*, 49 N. Y. 420; s. c., 10 Am. Rep. 389; *Pollitt v. Long*, 56 N. Y. 200, and *Warner v. Delaware, etc., R. Co.*, 80 N. Y. 211; s. c., 36 Am. Rep. 608.

This implied criticism upon the Ryan and Kerr cases is not an unjust one. Both of those cases have been distinguished, and had assigned to them a rather restricted and qualified value as precedents, but neither one has been held to have been wrongly decided upon the facts upon which it especially rested by any of the cases above enumerated, or to have been without some support both in reason and in justice.

The case of *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469, was an action by the latter against the former for negligently setting fire to its elevator standing on the bank of the Mississippi river in the State of Iowa, by means of which fire was communicated to the plaintiff's saw-mill and lumber, a distance of five hundred and thirty-eight feet, and such mill and lumber were also destroyed. The Supreme Court of the United States held that upon the facts as presented by the record, the railway company was liable for the

damages sustained by Kellogg, declaring the true rule to be that what is the proximate cause of an injury is ordinarily a question for the jury, and not one either of science or of legal knowledge, and disapproving the Ryan and Kerr cases in so far as they might be construed as enunciating a different rule.

The facts upon which the case of *Fent v. Toledo, etc., Ry. Co.*, 59 Ill. 349; s. c., 14 Am. Rep. 13, was based were as follows: On the 1st day of October, 1867, a locomotive with a train of freight cars attached, all belonging to the defendant, while passing eastwardly through the village of Fairbury, threw out great quantities of unusually large cinders, and by that means set fire to two buildings and a lumber yard. One of the buildings thus set on fire was a warehouse near the track. The weather being very dry, and the wind blowing freely in that direction, the heat and flames extended to the house of the plaintiffs, a distance of about two hundred feet, and destroyed it and most of its contents. The evidence tended to establish great negligence in permitting fire to escape from the locomotive. The defendant demurred to the evidence, and the Circuit Court held the evidence insufficient to sustain the action. The Supreme Court of Illinois, declining to follow the Ryan and Kerr cases, and asserting that they stood alone in the narrowness of the rule they prescribe on the subject of proximate damages, reversed the judgment upon the evidence.

In the case of *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166; s. c., 40 Am. Rep. 230, the Ryan and Kerr cases were also strongly disapproved by this court, but they were only incidentally referred to in that case as bearing on the general subject of damages resulting from negligence, and not because of any close analogy between them and the case then in hearing. We are consequently not irrevocably committed to any particular construction of those cases in their application to the class of cases to which they strictly belong.

In the Kerr case, the court, speaking through its chief justice, remarked that there may be cases in which the causes of disaster, though seemingly removed from the original cause, are still incapable of distinct separation from it; and where the maxim *causa proxima, non remota, spectatur*, is not controlled by either time or distance, but by the succession of events, and in that respect at least, that case is in harmony with the great weight of authority. See also the cases of *Gagg v. Vetter*, 41 Ind. 228; s. c., 13 Am. Rep. 322; *Louisville, etc., Ry. Co. v. Krimming*, 87 Ind. 351; *Perry*

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v. S. P. R. Co., 50 Cal. 578; *Baltimore, etc., R. Co. v. Dorsey*, 37 Md. 19; *Bachelder v. Heagan*, 18 Me. 32; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 id. 424; *Tourtellot v. Rosebrook*, 11 Metc. 460; *Clark v. Foot*, 8 Johns. 421; *Barnard v. Poor*, 21 Pick. 378; 1 Thomp. Neg. p. 147, §§ 1 and 2; *Higgins v. Dewey*, 107 Mass. 494.

An examination of the authorities we have cited, in connection with others touching the subject under consideration, will make it apparent that railroad companies have generally been held to a stricter accountability for the negligent setting and the negligent spread of fires than merely private parties, and most, if not all, other corporations. The reason of this is the extraordinary use which such companies are permitted to make of fire as an agency in the transaction of their business. By their locomotives and almost endless succession of trains, they send forth in all directions burning, bristling, breathing, seething streams of fire, calculated, oftentimes, to inflict irreparable injury upon the citizen, if not inexorably restrained. These extraordinary privileges involve the necessity of very great care to prevent the setting or spread of fire from locomotives, and have justified the courts in holding railroad companies to a strict accountability for any neglect of proper care in that respect. Railroad cases are therefore not always safe precedents in cases of negligent, but not intentional, fires in dwelling-houses, offices and other similar places of business, where the risk of the owner often is as great, if not greater, than any of his neighbors, and where such unremitting care as is required in the management of locomotives cannot be reasonably expected.

As applicable to all classes of the spread of negligent but unintentional fires, and as deducible from what appears to us to be the decided weight of authority, we think it may be safely stated, as a general rule, that where such a fire as the natural, immediate and proximate consequence of its negligent beginning, extends to an adjoining or an adjacent building and consumes it, the party responsible for the commencement of the fire must bear the loss, but where some new and independent agency has intervened and caused the extension of the fire to other buildings, the person originally at fault cannot be held liable. *Harrison v. Berkley*, 1 Strobh. 525. Whether the negligent party can be held accountable for the burning of more remote buildings, and if so, under what circumstances, are questions we have not fully considered, and con-

cerning which this case requires no definite expression of an opinion.

We construe both paragraphs of the complaint in this case to mean that the appellant's servants and employees negligently, but nevertheless accidentally, set fire to the station-house adjacent to the appellee's hotel building, and that while the station-house was on fire and being thereby consumed, the wind intervened and blew some of the sparks and flames over on to the hotel building, thus communicating the fire also to it, and causing it, with the personal property described, to be also burned up and destroyed.

As thus construed, neither paragraph of the complaint charged, either in direct terms or in equivalent words, that the destruction of the hotel building was the natural as well as the immediate and proximate consequence of the burning of the station-house. On the contrary, the fair inference from the averments in both paragraphs was, that if the wind had not intervened as a new and independent agency, the fire would not have extended to and consumed the hotel building and other property connected with it.

The unexpected intervention of the wind, even when the fire is voluntarily set upon the premises of the person setting it, has generally been accepted as the intervention of a new and independent agency, and this inference from the intervening force of the wind ought we think to have a much stronger and more general application to cases of merely accidental or unintentional fires. It is true that in the case of *Insurance Co. v. Tweed*, 7 Wall. 44, the Supreme Court of the United States refused to recognize the wind, which had carried sparks and flames from one building to another in that case, as the intervening of a new force or power, but that conclusion was reached as the result of the construction of a peculiarly worded policy of insurance, and not as an incident to any question of negligence, and cannot in consequence be regarded as a precedent of any great value in a case like this. It is a matter, too, worthy of observation that the fire complained of in this action did not originate in any defect in or mismanagement of any railroad machinery, but came from a stove used in an office for heating purposes only, and that in that respect this case stands upon a better footing than most of the railroad cases to which we have either generally or specially referred.

After the most mature consideration of every feature of the case before us, we feel constrained to hold that both paragraphs of the

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complaint failed to aver facts sufficient to justify the inference that the burning of the hotel building and other property of the appellee resulted as a natural, immediate and proximate consequence of the fire which caught in the station-house, and that for that reason the demurrers to both paragraphs ought to have been sustained.

Although the two cases are not analogous in every respect, the conclusion reached is in general harmony with our holding in the case of *Pittsburgh, etc., Ry. Co. v. Culver*, 60 Ind. 469, and other cases resting upon it. *Pittsburgh, etc., Ry. Co. v. Hixon*, 79 Ind. 111; *Louisville, etc., Ry. Co. v. Ehlert*, 87 Ind. 339.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

ZOLLARS, C. J., having been at one time of counsel in this cause, expresses no opinion and does not take part in the decision.

Judgment reversed.

NOTE BY THE REPORTER.—See *Hoag v. Lake Shore, etc., R. Co.* (85 Penn. St. 396), 27 Am. Rep. 253; *Lahigh Valley R. Co. v. McKeen* (90 Penn. St. 123), 35 Am. Rep. 644, and note 649; *Johnson v. Chicago, etc., R. Co.*, 31 Minn. 57; *Reed v. Penn. R. Co.*, 44 N. J. L. 280.

In *Small v. Chicago, R. I. & P. R. Co.*, 55 Iowa, 593, it was said: "The evidence shows that the fire was communicated from the Lobby elevator directly to the Union elevator and the property of plaintiff, some seventy feet distant. The court instructed the jury that the damages claimed in the action were not remote, and recovery might be had therefor. This instruction was excepted to. It is unquestionably correct and in accord with the great weight of authority. *Kellogg v. Mil. & St. P. Co.*, 94 U. S. 469; *T. P. & W. Ry. Co. v. Pindar*, 53 Ill. 447; s. c., 5 Am. Rep. 57; *Ins. Co. v. Tweed*, 7 Wall. 44; *Fent v. T. P. & W. Ry. Co.*, 59 Ill. 349; s. c., 14 Am. Rep. 13; *Kellogg v. C. & N. W. R. Co.*, 26 Wis. 224; s. c., 7 Am. Rep. 69; *A. T. & S. F. R. Co. v. Stanford*, 12 Kans. 354; s. c., 15 Am. Rep. 362; *Ingersoll v. S. & P. R. Co.*, 8 Allen, 438; *Perley v. Erie R. Co.*, 98 Mass. 414; *D. L. & West Ry. Co. v. Salmon*, 39 N. J. Law. 399; s. c., 23 Am. Rep. 314; *Clemens v. R. Co.*, 53 Mo. 366; *Poepers v. M. K. & T. Ry. Co.*, 67 Mo. 715; s. c., 29 Am. Rep. 518."

In *Rasper v. Nichols*, 81 Hun, 491, through A's negligence cinders escaped from the smoke-stack of his factory, setting fire to a building, the doors of which were locked, so that in consequence of a want of proper appliances, the fire extended to another building some distance off. Held that, A could not be held liable for the burning of the last building.

SHIMER V. MANN.

(39 Ind. 190.)

Will — rule in Shelley's case.

A devise of the rents and profits of lands to M. until his youngest child shall become of age, "upon the happening of which event the fee-simple of said lands shall then vest absolutely in said M. and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest," vests in M. an estate in fee-simple when his youngest child reaches majority, there being nothing in the context or circumstances plainly showing a different intention.

PARTITION. The opinion states the case.

A. C. Ayers, E. A. Brown and E. C. Buskirk, for appellant.

G. W. Spahr and P. W. Smith, for appellee.

ELLIOTT, J. On the 12th day of May, 1856, Lydia Latham executed her last will, containing these provisions:

"Item: I give, devise and bequeath to my late husband's nephew, Samuel B. Mann, all my personal estate, except my family Bible, which I give and bequeath to my niece, Martha Bane.

"Item: I give and bequeath to the said Samuel B. Mann the rents and profits of twenty (20) acres of land situate, lying and being in Warren township, Marion county, Indiana, near and adjoining to the lands of Esquire Shimer, until the youngest child of the said Samuel B. Mann shall become of age, upon the happening of which event it is my will and pleasure that the fee-simple of said land shall then vest absolutely in the said Samuel B. Mann and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest."

The Samuel B. Mann named in the will was the nephew of the testatrix, and at the time the will was executed, had three children living, Loren, James and Harvey L. Mann. Lydia Lathan died on the 13th day of June, 1857, and at the time of her death her nephew and devisee had no other children than those named. Of these the appellee was the youngest. In February, 1865, Samuel

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B. and Loren Mann united in a warranty deed purporting to convey the land to the appellant. The appellee arrived at full age in August, 1873, and instituted this suit for partition, claiming an undivided one-third of the land.

The right of the appellee to maintain his claim depends upon the construction of the will of Lydia Lathan. The ruling question in the case, shortly stated, is this: Does the will devise to Samuel B. Mann an estate in fee vesting absolutely when his youngest child attains full age, or does it vest the fee jointly in him and his children living at the time of the death of the testatrix?

Where a deed or a will uses the word "heirs," and uses it in its ordinary legal signification, a fee is vested in the first taker. This is the effect and force of the rule in *Shelley's* case, 1 Co. 88, and that rule enters into our law as a rule of property. *Sorden v. Galewood*, 1 Ind. 107; *Doe v. Jackman*, 5 Ind. 283; *Siceloff v. Redman*, 26 Ind. 251; *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Gonzales v. Barton*, 45 Ind. 295, *Maxwell v. Featherston*, 83 Ind. 339. If the will under discussion is governed by that rule, Samuel B. Mann, the first taker, took an estate in fee. Whether the will is or is not governed by that rule depends upon the answer to the question whether there is any thing in the situation of the parties, or in the context of the instrument, plainly indicating an intention to assign to the words of limitation a meaning different from their ordinary legal signification.

There is a material difference between deeds and wills, and much more liberality is exercised in the construction of the latter instruments than in the former, for where a will is presented for construction, the chief effort of the courts is to discover and carry into execution the intention of its author, and to this end minor considerations are subordinated. *Brooks v. Evetts*, 33 Tex. 732. But while this is true, it also true, that where words of definite legal meaning are employed, they will be assigned that meaning, unless the context of the instrument makes it plain that the testator employed them in a different sense.

In *Nelson v. Davis*, 35 Ind. 474, the court quoted the statement of Chancellor WALWORTH, made in *Schoonmaker v. Sheely*, 3 Denio, 485, that "The word 'children,' in its primary or natural sense, is always a word of purchase, and not a word of limitation; and the word 'issue' is very frequently a word of purchase also. But 'heirs,' and 'heirs of the body,' are in their primary and natural sense words

of limitation, and not of purchase." The definition adopted by the chancellor is one that has long been recognized and accepted by the courts, and the strictness with which they have adhered to this definition has exercised a potent influence upon the disposition of lands by deeds and wills. 2 Redf. Wills, 67; 3 Jarman Wills (5 Am. ed.), 115. The word "heirs" written in a deed or will is one of great power, and its force is not impaired by the mere use of negating or restraining words. Fearne expresses this doctrine in very strong words, for he declares that "the most positive direction" will not defeat the operation of the rule in *Shelley's* case. 2 Fearne Remainders, § 453. It may be that this statement of the law is somewhat too strong under the doctrine of later cases, but certainly the law is that mere negating words cannot restrain or impair the force of the word "heirs." 3 Jarman Wills (5th Am. ed.), 115.

We have no doubt that the word "heirs" may be construed to mean children, where it is plain that the testator employed it in that sense. *Ridgeway v. Lanphear*, 99 Ind. 251; *Hull v. Beals*, 23 Ind. 25; *Star Glass Co. v. Morey*, 108 Mass. 570; *Scott v. Guernsey*, 48 N. Y. 106; *Urich's Appeal*, 86 Penn. St. 386; s. c., 27 Am. Rep. 707; *King v. Beck*, 15 Ohio, 559; *Guthrie's Appeal*, 37 Penn. St. 9; *Jordan v. Adams*, 9 C. B. (N. S.) 483; *North v. Martin*, 6 Sim. 266. While it is true that the word "heirs" may be explained to mean children, it is also true that this meaning cannot be assigned to the word unless it very clearly appears that it was employed by the testator in that sense. The courts have used very strong language upon this subject. In one case Lord REDESDALE said: "The rule is, that the technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." *Jesson v. Wright*, 2 Bligh (H. L. Cas.) 1, 56. Stronger still is the statement of Lord DENMAN, who said: "Technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense." *Doe v. Gallini*, 5 B. & Ad. 621. Redfield says: "Conjecture, doubt, or even equilibrium of apparent intention, will not suffice." 2 Redf. Wills (2d ed.) 67; *Guthrie's Appeal*, *supra*; *Jordan v. Adams*, *supra*; *Poole v. Poole*, 3 B. & P. 620; *Doebler's Appeal*, 64 Penn. St. 9.

The language employed by the testatrix in the final clause of the last item of the will is "upon the happening of which event it is my will and pleasure that the fee-simple of said land shall then vest absolutely in the said Samuel B. Mann and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest," and this clause certainly does not evince an intention to use the word "heirs" as meaning children; so far indeed is it from doing this that it does the exact opposite, for it in terms vests a fee in Mann and his heirs and declares that he may dispose of the estate, or that his heirs may do so. If we ascribe to this language its usual force and effect, we are carried to the conclusion that the testatrix intended that upon the happening of the designated event Samuel B. Mann should be invested with an absolute power of disposition, but that if he died without exercising this right, then his heirs should be invested with it, and this conclusion makes it apparent that the word "heirs" was employed in its technical sense. The right of disposition is first vested in Samuel B. Mann, and this is in exact agreement with the technical import of the term "heirs," as well as with the phrase, "the fee-simple of said land shall then vest absolutely in the said Samuel B. Mann and his heirs." The language employed in describing the power of alienation does not import a joint power, but a several one; for the disjunctive form of the conjunction is used, and the effect is to declare that either may dispose of the estate, postponing however the rights of those who may become heirs to those of the person first named. As Mann could have no heirs during his life, the power of disposition was first and fully in him as the first taker, and in his heirs only upon his decease, and without any express provision to that effect, this would have been the force of the words "fee-simple" as well as of the word "heirs." 1 Preston Estates, 71, 72, 73.

Superadded words, which merely describe or specify the incidents of the estate created by such a word of limitation as "heirs," do not cut down the interest of the devisee. If we regard as explanatory the words which follow the term "his heirs" in the will under examination, then unless we wrench them from their natural meaning, we must treat them as more specifically describing the duration of the estate devised, for these words do not detract from the force of the word "heirs," but if that be possible, add to its force, because they describe an absolute power of alienation, which

is one of the chief incidents of the estate which the use of the word "heirs" operates to create. It may not have been necessary to describe a power incident to the estate created, but that an unnecessary thing was done cannot break the force of what the books often say is "a powerful word." "The proper and technical mode of limiting an estate in fee-simple," says Mr. Jarman, "is to give the property to the devisee and his heirs or to him, his heirs and assigns forever." 3 Jarm. Wills, 30. These words were here used, and as we have seen, it is the duty of the courts to affix to technical words their usual meaning, unless there is a clear manifestation of a purpose to use them in a different sense, and here the explanatory words, instead of manifesting such a contrary intention, exhibit an entirely different one, for they particularize incidents of the very estate which the technical words describe and devise.

It is contended that the word "or" should be read as "and" where it occurs in the clauses regarding the disposition of the land devised to Samuel B. Mann and his heirs. It is unquestionably true that the word "or" may often be assigned a conjunctive instead of a disjunctive effect. 1 Redf. Wills, 471; 1 Jarm. Wills, 419. But changes of this nature are only made where it is clearly necessary to effectuate the intention of the testator, or give meaning and force to the will. The rule has long been settled that the word "or" will be read "and" when it is necessary to give effect to the words creating an estate of inheritance, but we know of no case holding that the word "or" will be read "and" for the purpose of defeating the effect of words accurately and clearly devising an estate of that nature. *Right v. Day*, 16 East, 67; *Read v. Snell*, 2 Atk. 642; *Harrison v. Bowe*, 3 Jones Eq. 478. The word "heirs" is one of dominating force, and it may sometimes compel a change of subordinate connective words, but connective words cannot be changed when they are in harmony with the controlling provisions of the will; much less can they be changed when the ruling words of the instrument would be weakened or obscured by the change. 1 Preston Estates, 367. It is only in clear cases that courts ever venture to make changes. No word, great or small, can be changed, except, to borrow a phrase from Redfield, 1100 "the clearest certainty." 1 Redf. Wills, 471; *Holcombe v. Lake*, 24 N. J. L. 686.

It is no slight obstacle to the success of the appellee that it be-

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comes necessary for him to require that the courts wrench the well-known term "heirs" from its legal meaning, and also change the words of the will by substituting words not found in it for those that are. The obstacle is all the greater, because the explanatory words of the instrument fully harmonize with its technical terms, and add to their force, thus tending, with great power, to show that the intention of the testator was to devise just such an estate as the technical words employed would do if they stood alone.

The devise of the income of the land to Samuel B. Mann until his youngest child shall become of age is neither unintelligible, nor is it inconsistent with the theory that the testatrix intended that he should take a fee upon the happening of that event, nor does it even make an unreasonable testamentary disposition of the land. It is perfectly reasonable to presume what, in truth, the language plainly imports, that the testatrix meant to deprive him of the power of disposing of the property so long as his children were unable to make their way in the world, so that he should have means of supporting them that he could not fritter away or lose by speculation or mismanagement. It may well be that she meant that as long as his children were not of age the power of disposition should be fettered, and that as soon as they attained full age he should have complete power over the property to do with it as he chose. Such a scheme of testamentary disposition is quite intelligible and perfectly reasonable, and in this instance entirely consistent with the whole frame and tenor of the will. More apt technical words to vest an estate, ripening into an absolute and unconditional fee upon the happening of a prescribed condition, could not have been chosen; than those adopted, and these words are in harmony with the general scheme evidenced by the whole tenor of the instrument by which the testatrix declared her intention regarding the disposition of her land.

The only persons designated as devisees, direct or remote, are Samuel B. Mann and his heirs. There is not a word expressive of an intention to give to him and to his children. The youngest child is not mentioned as a devisee, nor is any child; the reference to the youngest child is simply for the purpose of confining the conditional devise to a fixed time, namely, the time when that child attains full age. It is only in this connection that the word "child" is used; it is not used as descriptive of the object of the testatrix's bounty; it is simply used as marking the time when the

devisee's estate shall ripen into an absolute fee-simple. It is declared that upon the event of the youngest child's attaining full age, the fee-simple of said land shall then vest absolutely in said Samuel B. Mann and his heirs; but it is not intimated, directly or indirectly, that it shall vest in him and his children. It would be a violent stretch of judicial power to thrust in devisees neither named nor described in the will. Had the word "child" been used for any other purpose than that of fixing the time when the estate should enlarge into a fee, there would be much more force in the contention of the appellee, but it was used for that and no other purpose.

It is by no means uncommon to affix conditions to a devise, and a less estate may be granted to continue until the happening of a prescribed event, then to enlarge into an absolute fee. This is what the will now before us does. In the present case both the particular estate and the remainder are in Samuel B. Mann, and the only doubt is whether the estate can be said to have ever been a defeasible one. *Boraston's case*, 3 Coke, 19; *Goodtitle v. Whitby*, 1 Burr. 228; *Doe v. Lea*, 3 T. R. 41; *Doe v. Ewart*, 7 Ad. & Ell. 636; *Roome v. Phillips*, 24 N. Y. 463; *Phipps v. Ackers*, 9 Cl. & F. 583; *Edwards v. Hammond*, 3 Lev. 132.

It is the theory of the law that the particular estate and the remainder form one united estate, and that the whole estate issues out of the grantor at the same time, and if this be true, as it undeniably is, it would seem that the fee vests at once in the person to whom both the particular estate and the remainder are devised. 2 Washb. R. P. (4th ed.) 582, 596; 4 Kent Com. (12th ed.) 199; *Brattle Square Church v. Grant*, 3 Gray, 142; 2 Bl. Com. 166.

We need not however decide the question whether the estate in fee vested absolutely in Samuel B. Mann at the time of the testatrix's death, for conceding that he took only a conditional fee, still as the condition upon which the estate was granted had happened, his rights became absolutely vested. If the estate was a conditional fee, it became absolute when the contingency arose which destroyed the force of the condition. 1 Preston Estates, 476. We think that the devise must be regarded as creating a conditional or limited fee, restricting the right of alienation until the youngest child of the devisee arrives at full age.

A conditional fee may be created by a will as well as by a deed, and as Preston says, "The existence of the condition precludes

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the estate of that simplicity which is the essential quality of a fee-simple." 1 Preston Estates, 475, 476. The existence of a condition subsequent does not however destroy the inheritable character of the estate. In the devise contained in the will before us, the condition is one restraining the power of alienation until a definite and specified time. Conditions like the one written in this will are effective, for they do not unreasonably restrict the power of alienation. *Langdon v. Ingram*, 28 Ind. 360; 1 Washb. R. P., top page 80, side 54.

Counsel for appellee assert that "There is no question that the will gives to Samuel B. Mann a fee-simple to an undivided part. The only question is whether Samuel B. Mann became vested with a fee-simple title to the whole." The difficulty of maintaining the appellee's position is, that all the granting or devising words in the will import a several right in the devisee named, and do not imply a joint estate in him and others. *O'Brien v. Heeney*, 2 Edw. Ch. 242. To sustain this position all the words importing a several estate must be changed so as to make them describe a joint estate. To reach this conclusion it is not only necessary to change the word "or" into "and," but it is also necessary to change the singular pronoun "he" into the plural "they." We have already seen that changes are never made unless there is an imperious necessity, and there is here no such necessity, for the general frame of the will indicates an intention to make the devisee named the recipient of the bounty of the testatrix. But there are also the words "Samuel B. Mann and his heirs," still further manifesting, and in the most appropriate legal terms, the intention to bestow the estate upon one person and not upon three persons.

It is said that no one can have an heir during his life, and therefore that the words "his heirs" mean his children. The premise is true, but the conclusion does not follow. A devise to a man and his heirs vests an estate of inheritance which will go to the legal heirs, whether they are children or other kinsmen. At common law the word "heir" or "heirs" was the strongest term that could be used to create a fee, and in many cases was indispensably necessary to create such an estate. It cannot therefore be logically possible that because the term "heirs" is used the devise is limited to children and the estate of the first taker cut down to an estate for life. If this conclusion be just, then for many centuries courts and authors have given a radically erroneous meaning to the words "his heirs."

The argument that because the devisee named has living children at the time the will was made, the words "his heirs" mean his children, proves, if it proves any thing, too much, and thus works its own overthrow. If this argument be sound then all devises using those words create only a life estate if there are children of the devisee living, and that this is not true all the cases upon the subject declare in most emphatic terms. If the words used are such as create an estate in fee, that estate the devisee takes, no matter whether he has or has not living children. The argument finds no support from any decision, nor can it be supported on principle; it is indeed flatly opposed on all sides, for the term "heirs" is the term which of all others most strongly expresses an intention not to limit the estate to the children, but to bestow it in the most ample manner upon the devisee who first takes the estate.

In the case of *Vannorsdall v. Van Deventer*, 51 Barb. 137, the will gave to the wife of the testator all of his real estate during her life-time, and then proceeded as follows: "Fourth. I give and bequeath to the legal heirs of my brother, Abram Vannorsdall, deceased. Fifth. And the legal heirs of my sister, Maria Snyder, deceased. Sixth. I give and bequeath to the heirs of my brother-in-law, William Van Deventer; all my real estate at the death of my wife, Elizabeth, to be divided equally between each of the heirs above named after the decease of my wife, Elizabeth Vannorsdall." The court held that the word "heirs" should be held to mean children of the persons named. There are several points of difference between the will in that case and the one in this, but it is only necessary to name one to show that the two cases are governed by entirely different principles. In the case cited the words of inheritance, "legal heirs," did not follow the name of the first taker; here they do. What has been said respecting the difference between the case cited and the present is equally true of the case of *Hurd v. Horton*, 1 Denio, 165. It emphasizes this difference to note that in the case just named the contention was that the first taker took a fee, not by force of words creating such an estate, but by implication arising out of the fact that he paid a legacy charged upon the land devised. The point decided in *Simms v. Garrol*, 1 Dev. & Batt. Eq 393, was this: "A legacy to the lawful heirs of A., when it appears in the will that he is living, is equivalent, as a description, to a legacy to his next of kin, or to his children." Here the devise is to "Samuel B. Mann and his heirs." and thi-

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statement of itself fully exhibits the difference between the two cases. The devise in *Burchett v. Durdant*, 2 Vent. 311, was: "I give to my cousin John Higden and his heirs, during the life only of Robert Durdant, my kinsman, all those my messuages, etc., in Chobham in the county of Surrey; upon this trust and confidence, that he the said John Higden and his heirs, shall permit and suffer the said Robert Durdant, during his life, to have and receive the rents and profits thereof, which shall yearly grow due and payable.

* * * And from and after the decease of Robert Durdant, then do I give said lands and premises in Chobham unto the heirs males of the body of him the said Robert Durdant now living, and to such other heirs male and female as he shall hereafter happen to have of his body; and for want of such heirs, then to the use and behoof of my cousin Gideon Durdant and the heirs of his body."

The holding of the court, as the reporter gives it, was: "That this was a remainder vested in George Durdant; for the remainder being limited to the heirs of the body of Robert Durdant, now living, and George being found to be then the only son, it was a sufficient designation of the person, and as much as if it had been said to his heir apparent," and that "George Durdant took an estate tail." In the case under immediate mention the words of inheritance were not coupled with the name of the devisee, but the devise was definitely and expressly to him during his life. The words "to his heirs" are found in a distinct clause, reading: "And from and after the decease of Robert Durdant, then do I give the said lands and premises in Chobham unto the heirs males of the body of him the said Robert Durdant now living." There was no first taker of the fee named coupled with words of limitation, but words describing persons who should take after the life expired are used. It is plain that this clause described a person, or a class, who were to take, and that as the devise to the ancestor was during life and as there were no words of limitation coupled with his name, the persons described as devisees of the fee, took by virtue of the devise and not by inheritance. In the case at bar the words of limitation are appropriately coupled with the name of the devisee, and there are no words descriptive of a class or of a person, except the named devisee; all the words employed are words of limitation directly annexed to the name of the first taker, and their effect is to measure the extent of the estate devised to the first named devisee. In *Darbyson v. Beaumont*, 1 P. Wms. 229, the testator, after

devising the estate to trustees for a term of years, settled it on "the first son of his body lawfully begotten, and the heirs male of such first son, lawfully issuing," and this was held to be a description of the person entitled to take. In the case cited there was no devise with words of limitation to a designated person. There was nothing more than a description of the person entitled to take the inheritance, and this distinguishes the case from the class to which the present belongs. It would have been very different if, in the case cited, a first taker had been designated, and his name followed by words of limitation, but there was nothing of the kind in the will.

Where the appropriate words of limitation follow and are appropriately connected with the name of the first taker an estate in fee is created unless the superadded words clearly cut down the estate. This is an old and firmly established rule and we have not travelled an untrodden path in reaching the conclusion that the words of limitation, coupled with the name of the devisee, do not describe a class who are to take by devise, but operate to vest in the first taker an estate in fee-simple. In the case of *Jack v. Fetherston*, 9 Bligh, 237, the subject received a thorough discussion. TINDAL, C. J., in the course of his opinion, said: "The words which first occur in the devise, 'I give to my kinsman, William Fetherston and his heirs male, my real estates,' do, in a will, give to the devisee a clear and unequivocal estate tail. The only question therefore is whether the words which follow do with equal clearness and certainty cut down the estate tail so given to the devisee into an estate for life, and make his sons to take estates tail as purchasers, instead of by limitation." In *Pool v. Pool*, 3 B. & P. 620, Lord ALVANLEY said: "The first taker" shall be held to have an estate tail "where the devisee to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." The case of *Toller v. Attwood*, 15 Q. B. 929, is not unlike the present; there the devise was to E. for her separate use for life, with remainder to trustees to preserve contingent remainders, with remainder to the heirs male of the body of E. to be begotten, who shall live to attain the age of twenty-one years, and to his heirs and assigns forever, and it was held that the words, "who shall live to attain the age of twenty-one years," could not restrict the force of the words of limitation contained in the devise, and

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that E. took an estate tail. There are very many other cases declaring this doctrine. *Mills v. Seward*, 1 J. & H. 733; *Grimson v. Downing*, 4 Drew. 125; *Anderson v. Anderson*, 30 Beav. 209; *Moore v. Brooks*, 12 Gratt. 135; *Tipton v. LaRose*, 27 Ind. 484; *Small v. Howland*, 14 Ind. 592. In attaching great weight to the words of limitation, "his heirs," used as they are in close conjunction with the name of the first taker in the devise before us, we do no more than obey a rule which has, as Chancellor KENT says, for more than five hundred years formed part of the law, and upon which this court has again and again built its judgments. In thus regarding the words, we bring this class within the great class of cases found in the books, and distinguish it from the class of cases represented by *Burchett v. Durdant*, *supra*, and *Darbison v. Beaumont*, *supra*. The class represented by these cases is, in numbers, very limited and in character somewhat anomalous, but there is nothing in the decisions in the cases belonging to that class which antagonizes the great rule of property which controls cases like the one at bar. In all of the cases represented by *Burchett v. Durdant*, *supra*, and *Darbison v. Beaumont*, *supra*, the words of the devise were to the heirs of a person named, not to a named person and his heirs, as "to the heirs of Robert Durdant," and this phrase is rightly construed to mean kinsmen, for otherwise there would be no one capable of taking, because no man can have heirs during life; but where the devise is to A. and his heirs there is a person capable of taking the whole estate, and with his name are connected words of limitation describing such an estate. If in the case of *Burchett v. Durdant*, *supra*, the devise had read to Robert Durdant and his heirs, then the case would have been in principle like the one in hand; but there was no such provision. There was a provision essentially different, describing a class who were to take, and excluding, in unmistakably plain terms, the first taker from any thing more than a life estate.

Judgment of the General Term of the Superior Court reversed, with costs.

Petition for rehearing overruled.

Judgment reversed.

WACHSTETTER V. STATE.

(99 Ind. 290.)

Evidence — impeachment — cross-examination.

On a criminal trial the State had introduced evidence impeaching the general moral character of the defendant's witness, Lee. The defendant introduced a witness, Stapp, who swore that Lee's reputation for truth and veracity was good. *Held*, that the State might on cross-examination of Stapp show that Lee had been reputed to have been arrested for felony.* (See note, p. 98.)

CONVICTION of larceny. The opinion states the case.

R. B. Duncan, J. S. Duncan, C. W. Smith, J. R. Wilson, J. W. Gordon, L. O. Bailey, J. M. Cropsey and C. M. Cooper, for appellant.

F. T. Hord, attorney-general, *W. T. Brown*, prosecuting attorney, and *C. F. Robbins*, for the State.

Howk, J. [Omitting other matters.] The last error complained of by appellant's counsel is the action of the trial court in permitting the State's attorney to propound certain questions, upon cross-examination, to two of the appellant's witnesses, Thomas Stapp and Frank Wilson. One William Lee had testified on behalf of the appellant, and the State had introduced evidence tending to impeach Lee, by showing that his general moral character was bad. Stapp and Wilson were then called as witnesses by the appellant for the purpose of sustaining his witness Lee, by proving that Lee's reputation for truth and veracity was good. On cross-examination of Stapp, the State's attorney propounded to him, of and concerning Lee, the following questions:

1. "Did you hear of him being arrested in Hamilton county, Ohio, for grand larceny, and giving the name of William Smith?"
Ans. No."

2. "Do you know of his being in the station-house that week, in connection with a man here?" Ans. No."

To the witness Wilson the State also propounded, upon cross-examination, of and concerning Lee, the following questions:

1. "I will ask you, if you remember hearing his truth and verac-

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ity discussed in connection with a circumstance like this: In 1877 or 1878, do you remember of hearing it said, generally said, that he was connected with a number of men here who were knocking men down on the street, and a man was knocked down from Connersville, and the man arrested in Lee's cellar, with a lot of property, and Lee was arrested, and his story in regard to the transaction caused his reputation to be talked of among the policemen and people generally?"

2. "You never heard a discussion of the charges of robbery against him, and the story he told about them, and in that connection, a discussion of his reputation for truthfulness?"

Negative answers were returned by the witness Wilson to each of these questions.

Of the questions propounded to the witness Stapp, appellant's counsel say: "The State had no right, upon cross-examination, to ask the witness what he had heard as to Lee's honesty, or whether he had heard of his having been arrested for larceny in Hamilton county, Ohio, or of his having been in the station-house." It is claimed that the State's questions to Stapp were improper, and that the court's ruling thereon was error, because "the only inquiry made by defendant was as to Lee's reputation for truth and veracity. No other particular trait of character was inquired into."

In *Ledford v. Ledford*, 95 Ind. 283, this court said: "A very wide latitude is necessarily allowable in the cross-examination of an adverse witness, and just how far it may be extended in any particular case is a question largely in the discretion of the trial judge." Of course it is not meant by this, that it will not be error, in any case where the trial court may allow a party, upon cross-examination, to propound questions, clearly and palpably illegal and incompetent, to an adverse witness. But it was meant, that in every case, the error must be shown to be of such a wrongful and injurious nature and tendency as to amount to an abuse of the court's discretion. In the case in hand, the argument of appellant's counsel, against the competency of the State's questions to the witness Stapp, is based upon the assumption that the evidence in chief of the witness, that "Mr. Lee's general reputation for truth and veracity among his associates is good," did not open the door to a cross-examination by the State in regard to Lee's reputation for integrity or honesty. In other words, counsel imply, if they do not assert, that there is no proper or legal connection be-

tween a man's reputation for truth and veracity and his reputation for integrity or honesty; that while he may have the reputation of being a thief and a highwayman, his reputation for truth and veracity may still be good.

We are not inclined to adopt this view of the question under consideration. Truth or veracity is a trait of the man of integrity or honesty; it is never a trait of the thief or robber. The reputation for dishonesty or criminal conduct is, we think, utterly inconsistent with a good reputation for truth and veracity. We mean, of course, such dishonesty or criminal conduct as was imputed to Lee in the questions propounded by the State to Stapp and Wilson, and complained of by the appellant. When Stapp and Wilson had testified that the reputation of Lee for truth and veracity was good, it was competent for the State to show, upon cross-examination, that Lee had been reputedly under arrest, or in the station-house, on a charge of felony. If the witness Stapp had answered the questions propounded to him by saying that he had heard of Lee's arrest for grand larceny, and of his giving the name of William Smith, and of his being in the station-house, such evidence would have been as inconsistent and as completely at variance with his evidence in chief, as it would have been if he had testified, on cross-examination, that he had heard that Lee's general reputation for truth and veracity was not good. If Stapp had answered the questions put to him by the State in the affirmative, his testimony would not of course have proved that Lee was guilty of the larceny mentioned therein; but such answers would have strongly tended to show that Stapp's evidence in chief was unworthy of belief.

In *McDonel v. State*, 90 Ind. 320, it was held by this court that where a witness testifies in chief that the reputation of a party is good with respect to some quality or disposition, it is competent to show, on cross-examination, that he has heard reports at variance with the reputation he has given the party. Truth is so nearly allied to honesty or moral soundness, it seems to us, that where a witness has testified in chief that the reputation of a party for truth and veracity is good, it is competent to ask him, on cross-examination, if he has not heard of a certain matter which would seriously affect the reputation of the party for honesty and moral soundness, as being necessarily inconsistent and at variance with the reputation he had given the party. According to the best lexicographers of our language at least in this country, the words

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"truth," "veracity" and "honesty" are almost synonyms each of the other, very nearly the same definitions being given to each of such words. We are of the opinion therefore that the questions propounded by the State to the witnesses, Stapp and Wilson, were germane to the subject-matter of their evidence in chief, to such an extent that they were clearly competent on cross-examination.

In *Oliver v. Pate*, 43 Ind. 132, in discussing a similar question to the one we have been considering, this court said: "It is difficult, if not impossible, to lay down specific rules to control or limit the cross-examination of witnesses. The judge before whom the case is tried must, to a considerable extent, determine it, and in doing so must be governed by the circumstances attending the examination." Accordingly, in that case, the trial court having sustained objections to cross-examining questions somewhat similar to those propounded to Stapp and Wilson, and there being "no statement in the bill of exceptions showing the circumstances under which the proof was offered," it was held by this court that in sustaining the objections to such questions there was no error shown by the record. This is all that was decided upon the question now under consideration in the case last cited, and although it is cited and relied upon by appellant's counsel in support of their position in the case at hand, yet we are of opinion that there is no substantial conflict between the decision in that case and what we here decide.

Our Criminal Code provides, in § 1803, R. S., 1881, that "in all questions affecting the credibility of a witness, his general moral character may be given in evidence." Integrity or honesty, and truth or veracity, are all essential and constituent elements of good moral character. In the impeachment of a witness, the subject-matter of the inquiry, whether upon the examination in chief or the cross-examination, is his moral character. It would seem to follow therefore, where an impeaching witness has testified in chief, that as to one of the elements of moral character the reputation of the party sought to be impeached is good, it would be competent to cross-examine the witness in regard to the reputation of such party as to any other or all of the essential and constituent elements of good moral character.

We find no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

ZOLLARS, C. J., thinks that too much latitude was allowed on the cross-examination of the witness Thomas Stapp.

Petition for rehearing denied.

Judgment affirmed.

NOTE BY THE REPORTER.— Compare *Holland v. Barnes*, 58 Ala. 88; s. c., 25 Am. Rep. 595

In *Oliver v. Pate*, 48 Ind. 182, cited in principal case, it was held incompetent to ask a sustaining witness, on cross-examination, if he had heard his neighbors say that the sheriff had come to arrest him for larceny. The court said: "The proof offered was not legitimate as a cross-examination and would have laid no foundation for impeaching the witnesses. No time, place, or names of persons were mentioned. It was about a collateral and irrelevant matter, not affecting the general character of the appellee. It was a naked proposition to prove that the witnesses had heard the statement and nothing more. There was not even a charge that he was guilty, or that anybody in his neighborhood ever charged, suspected or believed that he was. We are at a loss to see on what ground the proof was admissible. Its only effect, we think, would have been to improperly prejudice the jury against the appellee. The right to ask the witnesses whom they had heard speak about the character of the appellee, and whether what they had heard said was for or against him, is not denied by the appellee. Under some circumstances he might go further and ask other questions."

In *McDonel v. State*, 90 Ind. 320, the court distinguish *Oliver v. Pate*, saying: "There the questions asked the witnesses on cross examination were as to what they had heard the neighbors say as to the honesty of a party whose reputation for truth and veracity they had testified was good."

In *Johnson v. State*, 17 Tex. Ct. App. 565, the charge being assault with intent to commit a rape, the court said: "On the trial defendant introduced testimony to the effect that his general reputation was that 'of a peaceable negro, and one who was always polite to white people, and especially to ladies, — the prosecutrix being a white lady. Afterward the State placed a witness upon the stand and asked him the question: 'What was the reputation of defendant in Denton county for being a peaceable, law-abiding man?' That portion of the question which called for defendant's reputation as a 'law-abiding man' was objected to by defendant, for the reason that evidence of his reputation should be confined to those qualities which had reference to the kind and class of offenses as the one on trial, and that evidence of reputation as to violations of the law in other respects than with regard to cognate crimes was calculated to mislead and prejudice the jury. The objection was overruled, and evidence of his general reputation 'as a law-abiding man' was allowed."

"It is a well-established rule that 'when a criminal intention is of the essence of the offense charged, the accused may, as relevant to the question of his guilt or innocence, put in issue and prove his general character in that respect which is impugned by the accusation.' *Coffee v. State*, 1 Tex. Ct. App. 548; *Lockhart v. State*, 8 Tex. Ct. App. 567. But the evidence should be restricted

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to the trait of 'character which is in issue, that is, it ought to have some analogy and reference to the nature of the charge. 3 Greenl. Ev., § 25; *Leader v. State*, 4 Tex. Ct. App. 163; *Jones v. State*, 10 Tex. Ct. App. 553; Whart. Crim. Ev. (8th ed.), § 60 and note. It was error to permit the prosecution to investigate defendant's general reputation as 'a law-abiding man' when he had not put it as such in issue."

In *Kee v. State*, 38 Ark. 155, on a charge of murder, evidence was held admissible to show that the prisoner was a quiet and peaceable citizen.

In *People v. Fair*, 48 Cal. 137, a charge against a woman, of murder, it was held that evidence that her general character for chastity was bad was incompetent. The court said: "The nature of the charge against the prisoner certainly did not *per se* involve an inquiry into her character for chastity. A good reputation for that virtue, had it been hers, and had she even offered to show, as part of her defense, that she possessed that reputation, must have been excluded upon objections of the prosecution, inasmuch as it involves a trait of character not in the slightest degree involved in the alleged commission of the crime with which she stood charged. It is inexact to say that proof of the general character of the prisoner is received, even on his own behalf, in courts of common law, in trials for felonious homicide. The inquiry in such cases is confined to the general character as to the trait involved in the offense charged. The chastity, or general character for chastity, of a female charged with the commission of such an offense, is no more necessarily involved thereby than is her general character for honesty of dealing in pecuniary transactions. The rules of evidence in criminal cases limit the inquiry to the characteristic impugned in the alleged commission of the offense under investigation."

See *People v. Crapo*, 76 N. Y. 288; a. c., 33 Am. Rep. 302.

SIMS V. SMITH.

(99 Ind. 469.)

Infancy — deed — delivery by husband — ratification.

If an infant wife with her husband executes and acknowledges a deed of her land, and authorizes him to deliver it, and he delivers it after she comes of age, without objection by her, and she says she is satisfied with the consideration, she is bound.*

ACTION to quiet title. The opinion states the case. The defendant had judgment below.

A. F. Shirts, G. Shirts, and W. R. Fertig, for appellant.

* Compare *Benneson v. Aiken* (102 Ill. 284), 40 Am. Rep. 592.

D. Moss, R. R. Stephenson, H. A. Lee, W. Neal, and J. F. Neal,
for appellee.

COLERICK, C. This action was brought by the appellant against the appellees to quiet her title to certain real estate in Hamilton county, Indiana. Her husband, John F. Sims, united with her as a plaintiff, in the institution of the action, but during its pendency he died, and by reason thereof it was thereafter prosecuted by her alone. It was averred in the complaint that on the 24th day of July, 1844, and prior to that time, the appellant was the owner in fee-simple of the west half of the south-west quarter of section six (6), township nineteen (19) north, of range five (5) east, containing eighty acres; that on said day she, with her said husband, executed a deed to Henry Bardoner, purporting to convey said land to him, and that he by divers mesne conveyances conveyed the same to the appellee Martha Smith; that at the time of the conveyance to Bardoner the appellant was a minor, under the age of twenty-one years, and then was and ever since has been the wife of said John F. Sims; that on the — day of March, 1881, before the commencement of the action, she and her husband disaffirmed the conveyance to Bardoner on account of her minority and notified the appellees of the fact; that the appellees were denying the right of the plaintiffs to disaffirm said deed, and asserting that they were the absolute owners of said real estate. Wherefore the plaintiffs prayed that said deed be declared void as to the appellant, and that her title to said land be quieted, etc.

To this complaint a demurrer, alleging insufficiency of facts to constitute a cause of action, was sustained. to which ruling the plaintiffs excepted, and refusing to amend their complaint, final judgment, on demurrer, was rendered against them, from which they appealed to this court, where the judgment was reversed. It was then held by this court that the complaint was sufficient. See *Sims v. Smith*, 86 Ind. 577. On the remanding of the cause to the court below, the appellees filed an answer of general denial to the complaint and also filed a cross complaint, in which many facts were averred, for the purpose of showing that the appellant had by certain acts therein recited, ratified and confirmed the deed so executed by her and her husband to Bardoner, or that she was by said acts and by omissions to act, bound at least, by an estoppel *in pais* against disaffirming it, and it was also therein averred that the ap-

pellant was in public speeches, declaring that she was owner of said real estate, which declarations were false, and cast a cloud upon the appellees' title to said real estate, and prayed that the title of the appellee Martha Smith to the land might be quieted as against the appellant, etc.

A demurrer to the cross complaint was overruled and thereupon an answer thereto in three paragraphs was filed, to the second and third paragraphs of which a reply in denial was filed. The first paragraph of said answer was a general denial. The issues so formed were tried by the court, who made a special finding of the facts in the case.

[Omitting this, the point being sufficiently stated in the head-note.]

The sole ground on which the appellant, in her complaint, assailed the validity of the conveyance in dispute was that at the time of its execution she was an infant. To entitle her to a judgment in the action, it was essential for her to establish, by proof, that fact. The court in its special finding of the facts found that she was an infant at the time she signed and acknowledged the deed, but was an adult at the time of its delivery. Upon the facts so found, the court as a conclusion of law thereon correctly declared that the appellant was not entitled to the relief demanded by her. It is well settled by the authorities that the delivery of a deed is a part of its execution (*Gray v. State*, 9 Ind. 25), and such delivery is essential to pass the legal title to the property. *Fletcher v. Mansur*, 5 Ind. 267. A deed takes effect from its delivery. *Hoadley v. Hadley*, 48 Ind. 452. And it may be written, signed, acknowledged and certified, and still be inoperative for want of delivery, whether the grantor be an infant or an adult. *Burkholder v. Casad*, 47 Ind. 418. The alleged infirmity of the deed in question grew out of the appellant's supposed disability of infancy, and not of coverture. So if the first disability did not exist, the second could not overthrow the appellee's title. *Buchanan v. Hubbard*, 96 Ind. 1. The language used by this court in the case last cited may be appropriately applied to this case. It was there said: "It is assumed by the appellee's counsel that although the deed was made on the 3d of October, the contract was not complete until the 15th of that month, when possession was delivered, and that as Mrs. Buchanan was of age at that time she cannot now avoid the deed. We are strongly inclined to agree with counsel that if the contract was not complete until the 15th of October, and was

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then consummated by the voluntary delivery of possession, the deed must be sustained. There is much reason for this conclusion. The deed was not voidable because the grantor was a *feme covert*, but because she was an infant, and if the contract was not executed until after Mrs. Buchanan arrived at full age, and was then consummated, the fact that she was a *feme covert* will not impair its force." In this case the execution of the deed was not consummated until the deed was delivered, and as it was not delivered, or the possession of the property conveyed surrendered to the appellee, as found by the court, until after the appellant became an adult, the deed was valid, although she was then a *feme covert*. The appellant, when she signed and acknowledged the deed, allowed her husband to control its delivery and authorized him to deliver it, but no time was specified for its delivery. For that purpose he acted as her agent, and his act in subsequently delivering it was effective against her. The court specially found that after the delivery of the deed, and after taking possession of the land that was received in exchange for the property in dispute, the appellant "expressed herself as well satisfied with the trade," which indicated a ratification by her of the act of her husband, in consummating the trade by the delivery of the deed. A husband may act as the agent of his wife, and his authority to so act may be given by her to him before he acts or his acts may be afterward ratified by her. *Lichtenberger v. Graham*, 50 Ind. 288.

As the judgment was clearly right on the merits of the case, and as no error affecting the substantial rights of the appellant occurred in the proceedings of the court below, the judgment ought to be affirmed.

PER CURIAM. The judgment of the court below is affirmed, at the costs of the appellant.

Judgment affirmed.

EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY v. MCKEE.

(99 Ind. 519.)

Master and servant — course of employment — tort.

Where a railroad company employs a detective to arrest and prosecute persons obstructing its track, and he arrests an innocent person, the company is responsible. (*See note*, p. 108.)

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ACTION for false imprisonment. The opinion states the case. The plaintiff had judgment below.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellant.

G. G. Reily, W. C. Niblack, W. R. Gardiner and S. H. Taylor, for appellee.

ELLIOTT, J. The complaint of the appellee contains, among others, the following allegations .

“ Plaintiff further says that the defendant Dwyer was at the day aforesaid, and for more than a year prior thereto had been, the agent and employee of said railroad company for the purpose of detecting, arresting and prosecuting all persons who should in any way unlawfully obstruct the railroad aforesaid in said county. That on the — day of November, 1882, the railroad track aforesaid was obstructed by some person or persons unknown to this plaintiff, and without his knowledge, direction or consent, and thereupon said railroad company directed the defendant Dwyer to arrest the persons who had so obstructed said road and cause them to be criminally prosecuted for such obstructions in the courts of said county ; that pursuant to said direction so received from said company, and in the discharge of his authority as the agent and employee of said railroad company as aforesaid, the defendant Dwyer thereupon proceeded to detect and arrest and prosecute criminally in the courts of said county the person or persons who had so obstructed the railroad aforesaid, and in so doing said Dwyer assaulted, arrested and falsely imprisoned plaintiff at said county on the — day of December, 1882, without any legal authority so to do, upon the charge made by said Dwyer against him, said plaintiff, of unlawfully obstructing said railroad in said county at the day the same was obstructed, as aforesaid, to-wit, on the — day of November, 1882 ; that thereupon said Dwyer placed handcuffs upon his wrists, and in company with others in said Dwyer’s employ, by threats of personal violence to him, said plaintiff, and by catching hold of the plaintiff’s person, compelled the plaintiff to go with him, said Dwyer, from his home in Knox county, Indiana, distant from Emison’s Station about three miles, to said station, in the night over a dark road, in the woods where it was cold and disagreeable, at which station said Dwyer compelled

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said plaintiff to get into a car on said railroad provided by said railroad company for that purpose, and said Dwyer thereupon, by means of said car, carried said plaintiff upon said railroad a distance of ten miles, at which point said Dwyer put said plaintiff off of said car in the woods, in the middle of the night, and in the darkest kind of a night, from which point said plaintiff was compelled to and did wander home, a distance of twelve miles, on foot, as best he could."

The appellant, in support of its assault upon the complainant, invokes the general rule that a principal is not responsible for the torts of an agent unless committed while engaged in the performance of duties within the scope of his agency. This general rule is too well settled and too firmly grounded in principle to be the subject of debate, and if this case is within it there is no necessity for discussion. But whether the case is within the rule is the question, and not whether there is such a rule as that asserted.

The liability of the principal is not affected by the fact that the tort was willfully committed, for it is now firmly settled that whether the wrong results from negligence or is the product of wilfulness, the principal is responsible if it was committed within the line of the agent's duty. *Indiana, etc., Ry. Co. v. Burdge*, 94 Ind. 46; *Louisville, etc., R. Co. v. Kelly*, 92 Ind. 371; s. c., 47 Am. Rep. 149; *Terre Haute, etc., R. Co. v. Jackson*, 81 Ind. 19; *Am. Ex. Co. v. Patterson*, 73 Ind. 430; *Pittsburgh, etc., R. Co. v. Theobald*, 51 Ind. 246; *Indianapolis, etc., Ry. Co. v. Anthony*, 43 Ind. 183; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; s. c., 10 Am. Rep. 103; *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588; s. c., 43 Am. Rep. 185; *Hoffman v. New York Cent., etc., R. Co.*, 87 N. Y. 25; s. c., 41 Am. Rep. 337; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350, 364; *Chicago, etc., R. Co. v. Flexman*, 103 Ill. 546; s. c., 42 Am. Rep. 33.

A principal is responsible for the acts of the agent performed within the line of his duty, whether the particular act was or was not directly authorized. *Louisville, etc., R. Co. v. Kelly*, *supra*; *Terre Haute, etc., R. Co. v. Jackson*, *supra*; *Am. Ex. Co. v. Patterson*, *supra*; *Noblesville, etc., G. R. Co. v. Gause*, 77 Ind. 142; s. c., 40 Am. Rep. 224. In speaking of a question like the one before us, the Court of Appeals of New York said: "It matters not that he" (the agent) "exceeded the powers conferred upon him by his principal, and that he did an act which the principal was not

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authorized to do, so long as he acted in the line of his duty, or being engaged in the service of the defendant, attempted to perform a duty pertaining, or which he believed to pertain to that service." *Lynch v. Metropolitan, etc., Ry. Co.*, 90 N. Y. 77; s. c., 43 Am. Rep. 141. It may be that the statement we have quoted needs some qualification, for we suppose that the belief of the agent would not make the principal responsible if it was in fact not well founded, but in the main the statement correctly states the law.

The rules we have stated lead to the conclusion that the principal is liable for the tort of the agent, where the particular act, although wilful and not directly authorized, was within the line of the agent's duty; but if the act was an independent one, and not within the scope of the agency, the person injured cannot compel the principal to respond in damages. It results from these fundamental doctrines, that where the principal confers a general authority upon the agent to make arrests for injuries to property, and the agent, in exercising that general authority forcibly and wrongfully arrests an innocent person, the principal who conferred the general authority is liable for the injury consequent upon the wrongful act. There are cases fully recognizing the principle upon which this conclusion is founded. The English statute authorizes the servants of railway companies to make arrests in certain cases, and it was held in *Goff v. Great Northern Ry. Co.*, 30 L. J. C. L. 148, that a railway corporation was responsible for the tort of its servants in arresting and imprisoning an innocent man. Addison, in commenting upon the general doctrine says: "In the ordinary course of affairs, the company must determine whether they will submit to what they believe to be an imposition, or use this summary power for their protection; and as the decision whether a particular passenger shall be arrested or not must be made without delay, it must be presumed that the officers of the company charged with the management of traffic have authority to determine whether passengers are to be taken into custody for this offense; and if by mistake an innocent person is apprehended by order of the superintendent, the company will be answerable for the wrong done." 2 Add. Torts, § 817.

This principle applies here, for the question is not as to the name or station of the agent, but whether the particular agent was within the line of his agency. Where the particular act is within the scope of the agency, then it is, in legal contemplation, the act of

the principal, no matter by what name the agent is designated. The material element is the authority of the agent, and not his mere name or position. *Terre Haute, etc., R. Co. v. McMurray*, 98 Ind. 358; *Chicago, etc., Ry. Co. v. Ross*, 112 U. S. 377. In *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485; s. c., 43 Am. Rep. 29, a man was employed to gather up evidence for the company in a pending action, and while engaged in that service offered a bribe to a witness, and it was held that his act was that of his employer. In the course of the opinion it was said: "He was empowered generally to perform that duty, without special directions. That part of the business of the company was placed in his charge, with the general authority to use his judgment in its performance. His acts therefore were the acts of the company, within the scope of his employment. His legal authority, of course, but extended to lawful acts. So it is true of all agencies, as they are not appointed for the purpose of committing wrongs, or the performance of illegal acts, except in rare cases. Few actions would be maintainable if a recovery could be had only in cases where express authority is given, or the agent required, to commit the wrong." The case of *Galveston, etc., Ry. Co. v. Donohoe*, 56 Tex. 162, asserts the same general doctrine in a very emphatic way. There the conductor caused the arrest of a passenger who had offered in payment of his fare what the conductor supposed to be a counterfeit bank note, and it was held that the company was liable. The case of *Lynch v. Metropolitan, etc., Ry. Co., supra*, holds that a railway company is liable to an action for false imprisonment, where its servants wrongfully caused the arrest and imprisonment of a person who was endeavoring to enter one of the stations of the company in violation of its rules. The decision in *Am. Ex. Co. v. Patterson, supra*, is fully in point here, and really rules the case. It was there said in speaking of the authority of the corporation to employ agents to make arrests, and of the liability of the corporation for the torts of the person so employed, that "Such companies must be deemed to be empowered to employ agents to do such work, as much as to accomplish its ordinary purposes and business. It sufficiently appears that the defendant corporation did employ, instigate and procure the action of Hazen, as set forth. From this it necessarily follows that the company must be held liable for any trespass committed by her said agent in the prosecution of that employment." A corporation, which selects an agent and gives

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him charge of a special department of its affairs, is responsible for the acts of the agent performed while engaged in the line of his duties, although the particular act may not have been authorized. This responsibility is not confined to acts rightfully performed, but extends to such as are wrongfully done. The test of responsibility is not whether the particular act was rightfully done and specifically authorized, but whether it was within the scope of the agent's authority. Where, as here, the corporation employs an agent for the purpose of arresting persons who do injury to its property, it is answerable for the tort of the agent who wrongfully arrests one who has committed no offense. 22 Alb. L. J. 484.

The case of *Helfrich v. Williams*, 84 Ind. 553, so much relied on by the appellant, does not antagonize our conclusion. In that case the point decided was that a complaint against the principal was not good unless it alleged that the negligent act was committed by the agent within the line of his duty. So we hold here. We do not hold the appellant responsible for the tort of Dwyer, simply because he was its agent, but we hold it liable for the reason that he committed the tort while engaged in his principal's service, and within the line of his duty.

Dwyer testified, among other things, that "Mr. Hepburn, superintendent of defendant, directed me to go and hunt up any person I found guilty;" and there was other evidence tending to show the employment. The fact that the agent arrested a person not guilty does not relieve the principal from liability, for the delegation of authority to arrest persons deemed guilty by the agent committed to him a broad general power, and if the agent, in attempting to exercise that power, did another injury, the principal must answer in damages. It was not necessary for the appellee to prove that the injury resulted from a rightful attempt to exercise the authority conferred, for whether the attempt was rightful or wrongful the injured person may compel the principal to respond in damages for an illegal injury inflicted in the exercise of the general authority. The question is not whether the act of the agent was a rightful exercise of the duty he owed his principal, but whether it was within the general line of his employment.

The evidence very satisfactorily shows that the arrest of the appellee was made while Dwyer was engaged in the general line of his duty, for it shows that he was at the time searching for persons who had illegally obstructed the appellant's track. There are facts from

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which it may well be inferred that the arrest of McKee was not for an independent crime, but for an offense against the corporation. It is sufficient, if the facts proved supply reasonable grounds for the necessary inferences, and here the evidence does supply such grounds. It is not necessary to make out a case by positive evidence. *Indianapolis, etc., R. Co. v. Collingwood*, 71 Ind. 476; *Indianapolis, etc., Ry. Co. v. Thomas*, 84 Ind. 194; *Hedrick v. D. M. Osborne & Co.*, 99 Ind. 143.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Geraty v. Stern*, 80 Hun, 426, the plaintiff went to the defendant's store in New York city to purchase an ulster for herself. After she had examined one and put it on preparatory to its purchase, a floor walker in the employ of the defendant approached and told her that she did not wish to purchase the ulster, but was a spy from a rival establishment, and told the saleswoman to take the cloak from the plaintiff, which was done. *Held*, that this constituted an actual assault, and that the defendants were liable for it. The court said: "The liability of masters is not measured entirely by their instructions to their servants. If the act of the servant be within the scope of his authority, and committed in his master's business, the latter is responsible. *Higgins v. Waterliet Turnpike Co.*, 46 N. Y. 28; s. c., 7 Am. Rep. 233. In this case there can be no claim that the employees of the defendant were prompted by malicious motives or selfish aims. Their action was in their line of duty as they understood it. The duty to act was cast on them then and there. Their instructions were not to show styles or give prices to persons who came from other stores to look at styles or obtain prices. Here an emergency arose, where such a case was presented as the employees believed, and the duty of deciding was imposed on them. They may have decided unwisely, but their decision and action was clearly within the line of their duty, and the defendants are responsible for the resulting consequences. It was for no selfish purpose that they submitted the plaintiff to indignity, but to serve the defendants only, and if they devolved the duty of carrying out their instructions on their employees they must be held responsible for the manner in which it is done; no other rule would meet the requirements of public policy or public convenience."

See *Chicago & Eastern L. Co. v. Flexman*, 103 Ill. 546; s. c., 42 Am. Rep. 83, and note, 86, *Williams v. Planters' Ins. Co.* (57 Miss. 759), 84 Am. Rep. 494, and note, 495. Compare *McCarthy v. De Arnaut*, 99 Penn. St. 68, holding that a city is not liable for the arrest of an innocent person in good faith by the mayor and police, same principle, *Trammell v. Town of Russellville*, 84 Ark 105; s. c., 86 Am. Rep. 1.

CITY OF LOGANSPORT V. UHL.

(89 Ind. 531.)

Injunction — laches.

Where the owner of a water-power suffers a city to erect water-works designed to be fed from the same stream, without objection and without the assessment and pre-payment of his damages he may not have an injunction against their use, on the ground of injury to his water-power. (*See note, p. 117.*)

SUIT for injunction. The opinion states the case. The injunction was granted below.

D. P. Baldwin, D. D. Dykeman, W. T. Wilson, G. C. Tabor, J. C. Nelson, and Q. A. Myers, for appellant.

D. B. McConnell, R. Magee, S. T. McConnell, D. C. Justice, and C. E. Tuber, for appellees.

NIBLACK, J. This was a suit for an injunction.

[Omitting first paragraph of complaint.]

The second paragraph repeated, in a general way, but more in detail, the facts contained in the first paragraph, with the additional averments that the plaintiffs never became aware of the extent of the injury inflicted upon them until a short time before the commencement of this suit, and that the city of Logansport had never by resolution, ordinance or otherwise, fixed or determined the amount of water it desired or intended to divert from Eel river to supply its water-works, so that the plaintiffs had been unable to take the initiative to have their damages assessed.

Demurreis to both paragraphs of the complaint were severally overruled, and issues were then formed upon them.

At the hearing, the Circuit Court made a general finding for the plaintiffs, and decreed that unless the city of Logansport should within the period of one year thereafter, cause the plaintiffs' damages to their mill property to be assessed, the defendants would, after the expiration of that time, stand and be enjoined from diverting water from Eel river, except for the purpose of extinguishing fires.

Error is first assigned upon the overruling of the demurrer to the first paragraph of the complaint, and in support of that assignment of error it is argued that upon the facts averred in that paragraph the appellees have been guilty of laches in the enforcement of their right to an undisturbed flow of water in Eel river, and have practically estopped themselves from all claim to relief by injunction by their delay in the commencement of this action.

In response to that argument, it is contended that the appellees' right to an unobstructed flow of water in the channel of Eel river, above their mill, is one so firmly secured to them by the Constitution that it can neither be abridged nor taken away from them except by proper proceedings to assess their damages, or by the adverse use of the water for a period of twenty years, and that hence no laches can be imputed to them in consequence of their delay in bringing this action. It is also contended that the paragraph in question is good as a complaint for at least nominal damages, as well as a complaint to have the appellees' title quieted. But the paragraph made no demand, and did not purport to be a complaint for damages; neither was any question of adverse title presented by the facts it contained. The appellees and the city of Logansport are shown to be riparian proprietors of land, under undisputed titles, upon the same water-course. As applicable to such riparian proprietorships, Washburn on Easements and Servitudes, at page 286 (3d ed.), says: "Now the rights of a riparian proprietor of land, over which there is a flowing stream of water, are to use it for any and all lawful purposes, while it is passing, in its natural current, over his land. But the specific water that may be thus passing is not his property except through its use; nor has he a right to detain it otherwise, since the rights of all riparian proprietors upon any stream, in respect to the waters thereof, are in the eye of the law, equal and the same. The obligation of any one of these to suffer it to flow to the proprietor below is equally stringent and imperative as his right was to have it flow to him from the proprietor above."

The right of a riparian proprietor to have the water in the stream above flow to him is usually denominated a "natural easement," but it is not strictly an easement, since an easement rests upon some supposed grant or title by prescription. It is rather a natural right incident, and not appurtenant, to the land. It is however an absolute and inseparable incident to the land, which can only

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be lost by grant or by twenty years' adverse possession. Washb. *supra*, 21, 287.

The city of Logansport, by its purchase of the upper mill-dam, mill-race, water-power and appurtenances, which had formerly belonged to Hamilton & Taber, succeeded to all the rights pertaining to an upper mill-owner on the same stream with the appellees. Where two or more owners of mill property upon the same stream shall have severally occupied their premises with hydraulic works of art, each has the right to make use of the water in a reasonable manner, having reference to a like right in the other or others, and to the rights of other riparian proprietors, and when a question arises as to what ought to be considered such a reasonable use, it becomes a matter for judicial inquiry.

Washburn, referring to these relative rights of mill-owners, on page 347, further says: "A large proportion of the cases, where conflicting rights are set up by such mill-owners to the use of water, will be found to have been determined by the application of this broad rule of what is a reasonable use in view of the circumstances of each particular case. What a reasonable use of water may be, in any given case, depends upon the subject-matter of the use; the occasion and manner of its application; its object, extent, necessity and duration; and the established usage of the country, the size of the stream, the fall of water, its volume and velocity and prospective rise and fall,—all of which are important elements to be taken into account in determining the question." We have said thus much on the subject of the rights of riparian proprietors and mill-owners upon the same stream to illustrate more thoroughly, that upon the facts stated in the paragraph of complaint under consideration, no question of title was presented, but that the only question which arose upon those facts was whether the city of Logansport had made, and was likely to continue to make, an unreasonable, and hence wrongful use of the water flowing in Eel river above the appellees' mill-privileges, which the parties were and are entitled to use in common between them. Gould Waters, §§ 205, 206, 207, 208, 209; Godd. Easem. 296 *et seq.*; Ang. Water-courses, §§ 93 a, 444 *et seq.*

It has been held, and oftentimes reiterated by this court, that the sufficiency of a complaint must be judged of, and issues upon it formed, with reference to some particular theoretical right of recovery, and that the theory upon which a pleading has been

framed must be determined from the general tenor and scope of its averments. *W. U. Tel. Co. v. Reed*, 96 Ind. 195; *Sims v. Smith*, 99 Ind. 469.

The general tenor and scope of the paragraph before us show it to be in the nature of a complaint for an injunction, and the relief granted at the final hearing was upon the theory that the complaint as a whole constituted a complaint for an injunction. The paragraph therefore must be considered as a complaint for an injunction, and an injunction only.

The granting or refusal of an injunction rests, in each particular case, in the sound discretion of the court. An injunction ought not therefore to be granted when it would be against good conscience, or productive of great hardship, oppression or injustice, or of public or private mischief. 1 High Inj., § 15; *Godd.*, *supra*, 368; *Sheldon v. Rockwell*, 9 Wis. 158; *Pettibone v. LaCrosse, etc., R. Co.*, 14 Wis. 479; *Cobb v. Smith*, 16 Wis. 661; 2 Barb. Ch. Pr., § 608, n. 4; *Owen v. Field*, 12 Allen, 457; *Reddall v. Bryan*, 14 Md. 444.

The discretion thus conferred in proceedings for an injunction must, it is true, be exercised according to the recognized principles of equity jurisprudence, but it is nevertheless a discretion to be used in promoting the ends of justice and a sound public policy.

As regards the effect of unreasonable delay in bringing suits of the class to which this belongs, *Pomeroy*, in his work on Equity Jurisprudence, states the doctrine to be, "Acquiescence in the wrongful conduct of another, by which one's rights are invaded, may often operate, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of *quasi* estoppel does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal actions alone." § 817.

This doctrine of acquiescence as a *quasi* estoppel is one of general application in proceedings to restrain the wrongful acts of another and to which effect has been given in numerous cases arising out of controversies concerning the use of, or right to use, water in flowing streams. But to make acquiescence effective to such an extent it must necessarily have been voluntary, and with knowledge of the wrongful acts complained of and of their probably injurious consequences.

High on Injunction states the rule to be that "one who has by his own acts consented to or acquiesced in the use of water in a particular manner will be estopped from afterward enjoining its use in that manner. Thus where complainant without objection has stood by and allowed defendant to erect a mill in violation of the terms of his grant to defendant of the right to use the water in a particular manner, he is by his silence debarred from any relief against such diversion of the water. * * *

"Upon similar principles it is held that long acquiescence on the part of the proprietors of a water-power in a certain measurement of water to which defendants are entitled, will preclude the proprietors from obtaining relief by injunction against such measurement or use of the water, especially where erections have been made by defendants at considerable expense, which would be almost a total loss in case the injunction should be granted. So acquiescence on the part of plaintiffs in the deprivation of water, which they afterward seek to enjoin, may stop them from obtaining relief in equity. Thus, where defendants were entitled by an act of Parliament to use water from plaintiffs' canal for a particular purpose, but for no other, and they had been for many years permitted by plaintiffs to use the water for other purposes, and [who?] then sought to enjoin such use, an interlocutory injunction was refused, even though plaintiffs had established their right by an action and judgment at law. And when it is sought to enjoin defendants from keeping their dam closed in such manner as to prevent the flow of water to plaintiff's mill, but plaintiff has delayed proceedings for a period of more than three years after the erection of the dam, he will not be allowed an injunction. And the fact that the damages sustained may be recovered at law affords additional ground for refusing equitable relief in such case." 1 High Inj., §§ 884, 885.

In the case of *Attorney-General v. New York, etc., R. Co.*, 24 N. J. Eq. 49, it was held that where the construction of an important public work has been permitted to proceed almost to completion, in full view of all the parties who could be affected by its construction, and large expenditures have been made, and liabilities incurred, and no action is taken to prevent the progress of the work for more than fourteen months, a court of chancery would not enjoin the further prosecution of the work.

In the case of *Traphagen v. Jersey City*, 29 N. J. Eq. 206, it was further held that where a suitor seeks to have a public improvement

enjoined, he must not only show that some right secured to him has been violated, and that he has no other adequate remedy, but he must also apply promptly, and that where by his laches he has made it impossible for the court to enjoin his adversary without inflicting great injury upon him, an injunction will be refused, and he will be left to pursue his ordinary remedy at law. A similar doctrine was announced in the cases of *State v. Paterson*, 40 N. J. L. 244, and *Rettinger v. Passaic*, 45 N. J. L. 146. Kerr on Injunctions (* p. 201) declares that "Parties, who possessing full knowledge of their rights, have lain by, and by their conduct have encouraged others to expend moneys or alter their condition in contravention of the rights for which they contend, cannot call upon the court for its summary interference."

This doctrine has been recognized by this court in general terms by the cases of *Palmer v. Stumph*, 29 Ind. 329; *Hellenkamp v. City of Lafayette*, 30 Ind. 192, and *City of Lafayette v. Fowler*, 34 Ind. 140. See also, the case of *Ricketts v. Spraker*, 77 Ind. 371, and the authorities there cited.

In commenting however upon the first three of these last-named cases, it is insisted by the appellees that they are in principle, and hence in legal effect, overruled by the more recent case of *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178, in which it was held that a land-owner, abutting upon a street in the city of Lafayette, was entitled to an injunction against a railroad company to restrain it from the use of the street until his damages were assessed and paid, where the application was made many years after the appropriation of the street and the construction of the company's line of road. But in that case no question was made upon the delay in bringing the suit, and nothing was either said or decided touching the effect of Cox's long acquiescence in the wrongful acts of which he complained. The case was made to turn upon another and wholly different question. It is only fair to assume that if Cox's acquiescence had been interposed as an objection, it would have been held that his application came too late. It is further insisted that under our Code, the question of the plaintiff's unreasonable delay in the commencement of his action cannot be raised by a demurrer to the complaint, and the case of *Harper v. Terry*, 70 Ind. 264. is relied upon as sustaining that construction of the Code. In that case, it was reaffirmed that where lapse of time is relied on as a defense to an action, it must generally, under our Code of Procedure, be

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pleaded as a defense, and be based upon some statute limiting the action. That is undoubtedly the proper construction of the Code when lapse of time is relied upon in an ordinary action as a defense, but the enforcement of a right by injunction constitutes what is known as an "extraordinary remedy," and the rules governing ordinary civil actions are not in all respects applicable. In a case like this, lapse of time is neither technically nor in any proper sense a matter of defense. It is of the essence of the application, that it has been made within proper time, and when it is shown upon the face of the complaint that there has been unreasonable delay, advantage may be taken of that infirmity in the application by demurrer.

It is further insisted that as the right of the appellees to have their damages assessed before any water could be lawfully diverted from the channel of Eel river was a right reserved to them by the Constitution, it was one which could not have been impaired by any lapse of time less than twenty years, and that in consequence, the doctrine of the text-writers and decided cases on the subject of acquiescence in the deprivation of ordinary property rights, to which we have referred, has no application to this or any similar case.

Any merely personal right reserved by the Constitution may be as readily waived as any other well-recognized right. Every suitor is entitled under the Constitution to a speedy trial, but it is a right which may be waived by asking for and obtaining a continuance of his cause. In all criminal prosecutions, the accused had a constitutional right to a public trial by an impartial jury in the county in which the offense with which he is charged may have been committed, and yet he might consent to secret trial and to be tried by a jury entertaining prejudices against him. A failure to object to a juror, at the proper time, on account of his partiality, operates as a waiver of the accused's right to complain that the juror was not impartial. *Adams v. State*, 99 Ind. 244; *Murphy v. State*, 97 Ind. 579.

[Minor points omitted.]

Upon the facts stated, to which we are required to give a construction, the appellees have been and are likely hereafter to be injured by the diversion of water by the appellants from the channel of river above them. This right of a riparian proprietor or mill-owner to have the water flow to him from the stream above is one which may be taken into account in the assessment of damages to

real estate to which it is incident. Washb. *supra*, 446; Gould Waters, § 245.

The appellees might therefore at the proper time, have caused the city of Logansport to be enjoined from diverting water from their mills until their damages were assessed and paid. *Sidener v. Norristown, etc., Turnpike Co.*, 23 Ind. 623; *Cox v. Louisville, etc., R. Co.*, *supra*, and authorities there cited. How long this equitable remedy remained open to them we need not now inquire, since such an inquiry is not necessarily involved in the decision of this cause. The inference is plain that the appellees had knowledge of every step taken by the city of Logansport looking to the erection and maintenance of its water-works, and of the consequent diversion of water which was likely to ensue. With this knowledge no resistance seems to have been made. This justifies the conclusion that the acquiescence of the appellees in all that was done pertaining to the water-works was, in all respects, a voluntary acquiescence, and has been for a length of time and under circumstances which utterly preclude any claim of equitable relief by injunction. Nothing therefore of a remedial character remains to the appellees except their right to compensation for damages presumably already and hereafter to be sustained.

This right to compensation may be enforced either by actions for damages or by causing their damages to be assessed under section 909, R. S. 1881, which in its general scope and spirit extends to both lands and water taken for water-works under the right of eminent domain. As to the measure of damages in a case like this reference is made to the case of *Cowdrey v. Inhabitants of Woburn*, 136 Mass. 409.

The following cases are also cited as having a bearing on some of the questions discussed in this opinion: *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St. 169; *Birmingham Canal Co. v. Lloyd*, 18 Ves. Jr. 514; *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 78; *Thomas v. Woodman*, 23 Kans. 217; s. c., 33 Am. Rep. 156; *Burden v. Stein*, 27 Ala. 104; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Jones v. City of Newark*, 11 N. J. Eq. 452; *Bowman v. Wuthen*, 1 How. 189; *Blanchard v. Doering*, 23 Wis. 200; *McQuiddy v. Ware*, 20 Wall. 14; *Hught v. Price*, 21 N. Y. 241; *City of Logansport v. LaRose*, 99 Ind. 117.

No argument has been submitted upon the sufficiency of the second paragraph of the complaint. We consequently make no formal ruling upon its sufficiency.

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As the judgment appealed from seemingly rests upon both paragraphs, it will in any event have to be reversed for error in overruling the demurrer to the first paragraph.

If the Circuit Court shall be called upon to consider the question of the sufficiency of the second paragraph, it will keep in view the principles and conclusions hereinabove announced.

The judgment is reversed with costs, and the cause remanded for farther proceedings not inconsistent with this opinion.

Petition for rehearing denied.

Judgment reversed.

NOTE BY THE REPORTER.—In *State v. Paterson*, 40 N. J. L. 246, it is said: "It is admitted, in behalf of the city of Paterson, that there have been irregularities in these proceedings, and it is also conceded that if the prosecutors had acted promptly the defects are such that the grading and curbing of this avenue could have been stopped. But it is also contended that the prosecutors had actual notice of these improvements before they were made and during their progress; that with this knowledge they permitted the work to go on to completion, and after the city had expended and actually paid the whole cost thereof, now refuse to pay their respective assessments because of these preliminary defects. All the proofs in the case show that they had such notice, and there is no denial on their part. They were not in a position to be silent if the city was acting with a misapprehension of its right and under color of authority given it by the charter to grade, pave and curb the streets. The first work done upon the land of each, or affecting it, with their knowledge, was notice to them that the city authorities were there with a claim of right to make a public improvement, and if they neglected to make the proper inquiries, or to object with an assertion of their rights as land-owners until the work was done and paid for, such conduct is a waiver of all objections to the right to make such improvement. This has become the settled law in our State relating to such improvements. *State v. City of Paterson*, 36 N. J. L. 150; *State v. Morristown*, 84 N. J. L. 445.

"After such acquiescence in the acts of the city officers and delay in enforcing their legal remedy the objections that may be made by land-owners affected by the improvements must relate only to the apportionment and amount of the assessment made upon them for the damages and benefits resulting from such improvements."

In *Easton v. N. Y., etc., R. Co.*, 24 N. J. Eq. 57, the chancellor said: "A mere objection or protest, on a mere threat to take legal proceedings, is not sufficient to exclude the consequence of laches or acquiescence in such a case as the present. A notice was indeed held to be sufficient in the case of *Attorney-General v. Hudson River R. Co.*, 9 N. J. Eq. 527; but in that case the notice was given before the work began, and the bill was filed in a very few days after the notice was served. If acquiescence cannot be imputed to the complainants, they certainly are chargeable with delay which, though it may not amount to proof of acquiescence, may be sufficient to disentitle the complainants to the

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summary interference of the court by interlocutory injunction; and this principle applies with peculiar force where the act complained of is caused by a public company in the execution and construction of their works. The extent of the expenditure is, to a certain degree, the measure of the acquiescence."

See also *New York, etc., R. Co. v. Dennis*, 40 N. J. L. 358.

In *Traphagen v. Mayor, etc.*, 29 N. J. Eq. 206, the vice-chancellor said: "This court will even refuse to exert its prohibitory power in aid of rights asserted on behalf of the State, when it appears that its representatives, by silence and inaction, have presumably encouraged the outlay of large sums of money in the prosecution of an important public enterprise, undertaken in good faith, and which, if arrested, would bring disaster upon its projectors." *Attorney-General v. Delaware, etc., R. Co.*, 27 N. J. Eq. 1. The complainants, by laches, if not by acquiescence, have lost all right to have the use of this street forbidden. By delay they have made it impossible for the court to give them the special relief they ask, without doing great and irreparable injury to the public; they have therefore no claim to such relief as it is the peculiar province of courts of equity to give, but must be left to pursue their ordinary legal remedy. A court of equity cannot permit them to speculate upon the chances. The public authorities doubtless when they took possession believed the public had acquired a right to the use of this land as a public highway by dedication. If the complainants were not willing it should be taken for a public highway, for all purposes, without compensation first being made, their remedy was clear, and the course to be pursued plain. It may be that if the alternative had been promptly offered to the municipality to pay for the land before taking possession of it, or to let it alone, they would have let it alone; but the complainants, instead of adopting that course, have knowingly permitted their land to be appropriated, at great expense, to public use, and now when the public authorities have reached a point in the prosecution of the work where retreat is impossible, this court is asked to stretch forth its arm. The appeal comes too late; besides, there is reason to believe the complainants' delay was designed."

To the same effect, *Noesser v. Seeley*, 10 Neb. 460; also *Thomas v. Woodman*, 28 Kans. 217; s. c., 33 Am. Rep. 156; *Hanlin v. Chic., etc., R. Co.*, 61 Wis. 515.

In *Griffin v. Augusta and Knoxville Railroad*, 70 Ga. 164, it was said: "This record brings before us the sole point of the refusal of the injunction by the chancellor to enjoin a railroad company, which had completed and equipped its road at the cost of hundreds of thousands of dollars, from running its road through the complainant's land, which was part of the road-bed so completed and used by it, until the damage for the right of way and cutting down and using the timber thereon was assessed—the entry of the company thereon and use thereof as a right of way and the appropriation of the timber on the right of way not having been legally objected to until the whole road was built and equipped. We think it would have been inequitable to grant the injunction prayed for, under the facts * * *

"It is true that, under the Constitution of 1877, private property cannot be taken or damaged for public use, unless just and adequate compensation be

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first paid. Art. 1, § 3, Par. 1; Code, 5024; but if the owner allow it to be taken or damaged without legal opposition thereto until an immense sum of money has been expended in completing and equipping an entire road, of which his land is but a fractional part, of comparatively little value, it would not do to enjoin the franchise to the use of the entire road until that damage and occupancy were assessed and settled. One cannot stand by and suffer another to expend money to large amounts on his land, as part of a great system of improvement, and then stop by injunction the entire system until he is paid. He must move *in limine*. He must defend at the threshold. *Vigilantibus non dormientibus jura subveniunt*. Laches is a lock to the door of equity, which few keys, if any, are strong enough to open. Certainly none will open it when it has caused the expenditure of money which cannot be repaid, and caused injury which cannot be repaired. Pierce on Railroads, 168 and cases cited; *Wood v. Macon, etc., R. Co*, 68 Ga. 589."

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

MORRISON V. STATE

(Tex. Ct. App. 24.)

Criminal law — larceny — conversion of hired horse.

Where one hires a horse and subsequently converts it, an indictment for larceny will not lie unless it is shown that the felonious intent existed at the time of the hiring.

CONVICTION of larceny. The opinion states the case.

Brown, Ramsay & Crane, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. Appellant was tried and convicted in the lower court on an indictment charging him in the ordinary form with the theft of a horse, the property of one E. H. Blackwell. At the last Austin term his appeal from the judgment of conviction was affirmed by this court in an oral opinion. A motion for rehearing was submitted by appellant's counsel, accompanied by a most able argument upon the law and the facts.

As stated above, the indictment was an ordinary indictment for, and simply alleging the theft of the horse. The evidence in behalf of the State showed a hire of the horse by defendant from the

owner, and a subsequent sale of the horse by the defendant without the knowledge and consent of the owner; and the theory upon which the conviction rests is that the possession of the horse was originally acquired by defendant with false pretenses, and with a fraudulent intent to steal at the time he hired him. "It is well settled in this State that under an ordinary indictment for theft a conviction may be had on proof which shows that the taking, though with the owner's consent, was obtained by false pretext or with intent to deprive the owner of the value of the property and appropriate it to the use and benefit of the taker." *Dow v. State*, 12 Tex. Ct. App. 343, and authorities there cited. See also, *State v. Coombs*, 55 Me. 477; *Watson v. State*, 70 Ala. 13; s. c., 45 Am. Rep. 70.

But it is also equally as well settled that in order to sustain a prosecution for theft where the taking was originally lawful, the proof must show that the taking was obtained by means of some false pretext or with intent to deprive the owner of the value of the property and appropriate it to the use and benefit of the taker. *Hornbeck v. State*, 10 Tex. Ct. App. 408; *Dow v. State*, *supra*. Our statute is that to constitute theft, the taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft; but if the taking, though originally lawful, was obtained by any false pretext or with any intent to deprive the owner of the value thereof and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete." Penal Code, art. 727. But the felonious intent is the very gist of the offense, and is essential to the crime of theft in all its phases, and this intent must exist at the very time of the taking; no subsequent felonious intent will render the previous taking felonious. *Billiard v. State*, 30 Tex. 368; *Quitow v. State*, 1 Tex. Ct. App. 65; s. c., 28 Am. Rep. 396; *Johnson v. State*, 1 Tex. Ct. App. 118; *Dow v. State*, 12 Tex. Ct. App. 343.

"It may at one time have been considered the law of larceny, that although a hiring and taking in the first place might have been *bona fide*, yet if the time for which the hiring was made had expired, and the property is afterward converted, it is larceny. But such has not for a long time been the law, which is now stated correctly as follows: Where the horse was delivered on hire or loan,

and such delivery was obtained *bona fide*, no subsequent wrongful conversion pending the contract would amount to a felony. 2 Russ. Crimes (9th ed.), 237. Where the possession was obtained *bona fide*, the mere fact of the subsequent existence of the *animus furandi* does not make the offense larceny. 2 Whart. Cr. Law, § 1860. If one hires a horse and sells it before a journey is performed, or sells it after before it is returned, he commits no larceny in a case where the felonious intent came upon him subsequently to his receiving it into his possession." 2 Bish. Cr. L., § 864; *Hill v. State*, 57 Wis. 377.

In *Rex v. Banks*, Russ. & Ryan, 441, it was held that "if A. *bona fide* hire a horse for a particular purpose, and after that purpose is accomplished sell the horse, it is no larceny; for unless he had an original felonious intention, the subsequent withholding or disposing of the horse does not constitute a new felonious taking." This subject is most ably and elaborately discussed in many of the leading authorities cited in the editor's note to *Commonwealth v. James*, 1 Pick. 375, which case is reported in full in 2 Lead. Crim. Cases (Bennett & Head, 2d ed.), p. 181 *et seq.* It must be carefully observed however that the rule we have been considering applies only where in the first instance, the goods were obtained rightfully, as well as without the *animo furandi*. Every thing depends upon the intent, or existence or non-existence of the *animus furandi* at the time of the original taking. Where one has come into possession of personal property by consent of the owner, to warrant his conviction for the theft of the same, this fraudulent intent or *animus furandi* at the time of its acquisition should be established clearly and beyond a reasonable doubt.

[Omitting examination of facts.]

Reversed and remanded.

KERRY V. STATE.

(17 Tex. Ct. App. 173.)

Criminal law — indictment — privately stealing from the person.

Under a statute defining "privately stealing from the person" as "theft committed without the knowledge of the person from whom the property is

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taken, or so suddenly as not to allow them to make resistance before the property is carried away," an indictment simply charging stealing and carrying away privately from the person is bad.

CONVICTION of privately stealing from the person. The opinion states the point.

B. G. Johnson, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. [Omitting minor considerations.] A most serious question is raised upon the sufficiency and validity of the indictment. Defendant's motion to quash and motion in arrest were both overruled. We copy the charging portion of the indictment in these words, viz.: that defendant, "with force and arms, did unlawfully and fraudulently take, steal and carry away privately from the person of one Luke Brewer two silver dollars, current silver coin of the United States of America, of the value of one dollar each, which said silver coin the grand jury cannot more fully describe, then and there the corporeal personal property of said Luke Brewer, from and out of the possession of said owner, without his consent, with intent to deprive said owner of the value of said property and to appropriate it to the use and benefit of him, the said Lou Kerry, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State."

The objection urged is that the indictment alleges in general terms the offense of "privately stealing" from the person of another, without setting out the mode or ingredient of the offense. These are the exact statutory words used in declaring the offense in article 744 of the Penal Code.

The statute expressly defines in the next succeeding context article what circumstances must concur to constitute the offense of theft by "privately stealing" from the person of another. "1. The theft must be from the person; it is not sufficient that the property be merely in the presence of the person from whom it is taken. 2. The theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away. 3. It is only necessary that the property stolen should have gone into the possession of the thief; it need not be carried away in order to com-

plete the offense." Penal Code, art. 745. The question is, is it essential, in charging this crime, that the indictment should allege the mode and manner of its commission; that is, that it was "committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away?" There can be no doubt but that the State must establish the one or other of these two modes as a fact, in order to support the charge by the evidence; because it takes one or the other of these two facts to constitute the crime. With regard to criminal pleading our statute declares as a general rule that "every thing should be stated in an indictment which it is necessary to prove, but that which it is not necessary to prove need not to be stated." Code Crim. Proc., art. 421.

Mr. Bishop says: "The omission of any fact or circumstance necessary to the constitution of the offense—in other words made by law essential to the punishment—renders the indictment bad." 2 Bish. Crim. Proc. (3d ed.), § 325. Again says the same author: "As a rule for the indictment it is that every fact in law essential to the punishment shall be plainly and distinctly stated in terms sufficiently minute and technical to identify the offense and the offender." 2 Bish. Crim. Proc. (3d ed.), § 325. "But how far need the allegation descend into detail? It should, as far as may be, identify the particular transaction, and thus become specific in a manner to give the defendant all reasonable notice of what is to be produced against him." 2 Bish. Crim. Proc. (3d ed.), § 526; *Williams v. State*, 12 Tex. Ct. App. 395; *Huntsman v. State*, 12 Tex. Ct. App. 619.

"The general rule in criminal pleading is that if an offense may be committed in various modes, the party charged is entitled to have that mode stated in the indictment which is proven at the trial, and when a mode is stated and proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance." *Kennedy v. State*, 9 Tex. Ct. App. 403.

In setting out a statute offense, it is in general sufficient to describe it in the very words of the statute, because ordinarily no allegation of any thing more than the words of the statute necessarily import is required in order to show that the statute offense has been committed by the defendant. Clark's Crim. Law of Texas, pp. 419-20, and note, § 7. But there are many exceptions to this general rule. As for instance, "if extrinsic facts be necessary to

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bring the act within the statute, they must be averred." *Burch v State*, 1 Tex. 608; *West v. State*, 10 Tex. 553; *Brewer v. State*, 5 Tex. Ct. App. 248; *Vaughn v. State*, 9 Tex. Ct. App. 563. And if a penalty be denounced for the commission or omission of an act under certain circumstances, the indictment must charge the commission or omission under the circumstances specified. *State v. Wupperman*, 13 Tex. 33. And if a statute creates an offense composed of different constituents, each constituent being in itself an offense, the indictment must specify the particular constituents relied on, with accuracy. *State v. Williams*, 14 Tex. 98; s. c., 46 Am. Rep. 237.

"According to the rule of pleading as laid down in *Hawkins Pleas of the Crown*, it is not 'always sufficient to pursue the very words of the statute unless by so doing you fully, directly and expressly allege the fact in the doing or not doing whereof the offense consists, without any the least uncertainty or ambiguity.' 2 Hawk. P. C. chap. 25, § 111. A statute must often use general terms and comprehensive descriptions; whereas an indictment requires certainty in charging the offense so specifically as to give the party notice of what he is to meet and enable him to traverse the facts averred. This class of statute offenses are not sufficiently described in the indictment by being set out in the words of the statute, without more; because those words do not *ex vi terminorum* import all that is necessary to a legal description of the offense." 2 Lead. Crim. Cases, p. 174, and note.

In *Comm. v. Bean*, 11 Cush. 414; s. c., 2 Lead. Crim. Cases, 172, it is said: "The meaning of words in a statute may be and not infrequently must be ascertained by examination of the context. In the present case it is from the context that the words 'glass in a building' are understood on all hands to mean glass which is part of a building. But the court in ascertaining the offense with which the defendant is charged cannot look beyond the words of the indictment itself. If those words do not sufficiently charge the offense which the statute was meant to punish, the indictment is fatally defective." Citing 2 Hawk. P. C., chap. 25, § 111; 19 Pick. 304; 8 Cush. 215; 7 B. Monr. 247.

"When an indictment follows the words of a statute, it does not necessarily follow that those words have the same meaning in the indictment which they have in the statute. If there is nothing in the context, or in the other parts of the statute *in pari materia*, to

control or modify the sense and meaning of the terms in which the offense is defined, then it may be presumed that the terms in the indictment are used in the same sense with those in the statute, and whatever that prohibits the indictment charges. In such case the offense may be described and charged in the words of the statute. Otherwise, it may be necessary to frame the indictment in such terms as to designate the offense intended with precision." *Comm. v. McCarron*, 2 Allen, 157; *Comm. v. Cox*, 7 Allen, 577; *Comm. v. O'Connor*, 7 Allen, 583. "The tests are these," said WELLS, J., in a very recent case: "If every allegation may be taken as true and yet the defendant be guilty of no offense, then it is insufficient although in the very words of the statute." *Comm. v. Squire*, 1 Metc. 258; 2 Lead. Crim. Cas. 174.

Now, in article 744 of our Penal Code, the words used do not set forth, and were not intended to set forth fully, directly and expressly, all that is necessary to constitute the offense thereby intended to be punished. It is only by reference to the next succeeding context, article 745, that we can ascertain the constituents of the offense intended, and the indictment must allege one of the constituents. To illustrate the necessity of a charge of the particular mode in which this offense must be committed, take the charge as stated in the indictment, which is, "privately stealing." Would that charge be sustained by proof that the property was taken not only from the person but in his presence and when he knew that it was so taken? Surely not; such a taking could not and would not be a private taking. A private taking is one in which the party deprived of his property does not know of the theft. If he does know of it, then the offender can only be guilty if the taking was so suddenly done that the injured party had no time to make resistance before the property was carried away.

Now, while the words used in article 744 are "privately stealing," yet in order to make them cover a case of theft from the person, where the theft was in the presence and knowledge of the party deprived of his property, it was absolutely necessary to declare, as coming within the purview of the statute, what otherwise could not possibly have been imported by the words used; and the next succeeding article of the Code, which does declare the constituents of the offense, becomes consequently a necessary part of its definition. But for this second article 745, it would be no offense to take property from another "so suddenly as not to allow time to make resist-

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ance before the property was carried away." Without a provision engrafting that upon the offense as an element or constituent of it, proof of that mode of acquiring property from another would not sustain an allegation of "privately stealing." The very case we are considering only sustains a case of theft from the person upon the presumption that the crime can be committed by taking the property so suddenly that the owner had no time to make resistance; for the money was not taken from his person "privately," but with his knowledge — suddenly — and before he could make resistance. The allegation of this indictment is not supported by the evidence adduced in the case. In the case of *Woodward v. State*, 9 Tex. Ct. App. 412, it is said, "the act of privately stealing from the person of another is made *eo nomine* an offense against the law when the thing stolen was taken privately — was taken from the person and not merely in his presence; and the theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away. Penal Code, arts. 744, 745. An indictment which contains these essential averments, and which otherwise charges or embraces the general definition of theft as defined in article 724, would satisfy the demands of the law and sufficiently describe the offense of theft from the person." We have examined the record in *Woodward's* case, and the indictment charges that the property was taken so suddenly as not to allow time to make resistance before it was carried away.

Our conclusions from these authorities are that the indictment is fatally defective, and does not charge the crime of theft from the person as defined by our statute. The court therefore erred in overruling defendant's motions to quash and in arrest of judgment. The judgment is reversed, and because the indictment is fatally defective the prosecution is dismissed.

Reversed and dismissed.

WALTERS V. STATE.

(17 Tex. Ct. App. 282.)

Criminal law—larceny—of money to be changed.

The prosecutor handed the defendant a twenty-dollar bill to change, and he, pretending that he could not change it, fraudulently gave her a one-dollar bill instead of the twenty, and converted the twenty. *Held* a larceny of twenty dollars. (*See note, p. 129.*)

CONVICTION of theft. The head-note states the case.

Abernathy & Bro., for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. [Omitting other matters.] In reversing the case upon this ground it is perhaps well that we should consider another question earnestly insisted upon by appellant's counsel as conclusive of the fact that in no event could defendant be found guilty of a felony under the evidence adduced in behalf of the prosecution, but that his offense, if any, was but a misdemeanor, the amount stolen, if any, by him being less than \$20. As shown by the testimony, defendant proposed to give the prosecuting witness change for a twenty-dollar currency bill. She, the witness, handed the defendant the twenty-dollar bill, and when he pretended he did not have a sufficiency of change he handed her back, instead of the twenty, a one-dollar bill. It is insisted that if he stole any money at all, he only stole \$19, because he gave her back \$1.

The argument is specious, but not sound. He is charged with stealing the twenty-dollar bill; the evidence shows he got the twenty-dollar bill. The owner evidently never intended to part with the twenty-dollar bill; for the only condition upon which she agreed to part with the possession and title was that he would give her \$20 in change. This condition was not complied with, and his taking the twenty-dollar bill was fraudulent, even though he gave her the one-dollar bill in return. His object was to get the twenty-dollar bill—not \$19—and in order to do that, he had to give her \$1. The twenty-dollar bill was what she lost and what he took.

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That is the charge in the indictment, and if he is guilty of any offense, it is the theft of the twenty-dollar bill.

Because the court erred in overruling defendant's application for a continuance, the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTE BY THE REPORTER.—In *Reg. v. Bird*, 12 Cox C C.; s c., 4 Eng. (Moak) 533, the indictment charged the stealing of nineteen shillings. In fact the prisoner received a sovereign to take pay to the amount of 1*d* and give back the change, but gave back only 11*d*. at first, and later, 1*s.*, and refused to give back the 19*s.* change. COCKBURN, C. J., said: "The majority of the judges are of the opinion that the prisoner was not properly convicted of stealing the 19*s.* charged in the indictment, for she had not taken them from the prosecutrix, and could not therefore be convicted on this indictment. The majority of the judges do not say that she might not have been convicted on an indictment charging her with stealing the sovereign, if the issue had been properly left to the jury."

HAWKINS V. STATE.

(17 Tex. Ct. App. 503.)

Criminal law — assault — custom.

On a trial for assault with a pistol, it is incompetent to prove a custom of the defendant and his associates, when controversies or disputes arose among them, to curse, abuse and denounce one another in obscene, insulting and violent language, and flourish knives and pistols, with threatening gestures, as a mere matter of jest and without any intention to use them to the injury of any one.

CONVICTION of assault. The opinion states the case.

John Ballowe, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. [Omitting other points.] Defendant proposed to prove by each of the several witnesses the customs and habits of defendant and his associates, on occasions when controversies or disputes would arise amongst them, of cursing, abusing and denouncing each other in insulting, violent and obscene language,

frequently drawing their knives and pistols and flourishing them in fun and with threatening gestures, without any intention to use them to the injury of any one. This testimony, on objection by the prosecution, was excluded by the court as inadmissible and incompetent. In this ruling the court was correct. Whilst it might perhaps have been entirely legitimate to show, if possible, that defendant, in the circumstances inquired about, was simply indulging in characteristic though in only harmless fun, notwithstanding his language was violent and insulting and his actions threatening and dangerous, and whilst he was entitled, if he so desired, to put in issue his character as a man of peace, notwithstanding he was "full of strange oaths," overbearing and desperate in demeanor, and apparently utterly reckless in his fondness for the handling and display of dangerous and deadly weapons, still the evidence, we apprehend, would not be permitted to extend beyond his individual acts and conduct at the particular time, or his individual general reputation as a man of peace and good will. Evidence of custom, usage or habit amongst the select class of his associates was not admissible or competent.

Evidence of usage or custom in those circumstances where they have otherwise become firmly fixed and established is never "permitted to have effect when they contravene any established general rule of law; and therefore evidence in proof of any such usage is ordinarily inadmissible." 2 Greenl. Ev. (13th ed.), § 249. We are aware of no principle of law which would tolerate a usage, custom or prescription that would confer upon a citizen the right to act the rowdy to the disturbance of the peace and carry a six-shooter in violation of the general statutes.

We have found no error for which the judgment in this case should be reversed, and it is therefore affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

BUTTON V. HOFFMAN.

(61 Wis. 20.)

Corporation — sole owner of stock — replevin.

One who becomes the owner of all the capital stock of a private corporation, does not thereby become owner of its property, and cannot maintain replevin for it.

REPLEVIN. The opinion states the facts. The plaintiff had judgment below.

C. F. Ainsworth, and *S. U. Pinney*, for appellant.

Carl C. Pope, for respondent.

ORTON, J. This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer.

In his instructions to the jury the learned judge of the Circuit Court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and

became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed and disposed of. It must purchase, hold, grant, sell and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity. Ang. & A. Corp., §§ 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. Ang. & A. Corp., § 557. The corporation is the trustee for the management of the property, and the stockholders are the mere *cestui que trusts*. *Gray v. Portland Bank*, 3 Mass. 365; *Eulman v. Bowman*, 58 Ills. 444; s. c., 11 Am. Rep. 90; 4 Am. Corp. Cas. 350. The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. Corp., § 191; *Pope v. Brandon*, 2 Stew. (Ala.) 41; *Whitwell v. Warner*, 20 Vt. 444. The property of the corporation is the mere instrument whereby

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the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. *Bradley v. Holdsworth*, 3 M. & W. 422; *Waltham Bank v. Wallham*, 10 Met. 334; *Tippets v. Walker*, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no legal right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. Corp., §§ 160, 190, 557; *Hyatt v. Allen*, 56 N. Y. 553; s. c., 15 Am. Rep. 449; 4 Am. Corp. Cas. 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. *Wilde v. Jenkins*, 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs is the inception of any title of a stockholder to it, although he be the sole stockholder. Ang. & A. Corp., § 779a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint-owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate the business and defraud its creditors. The stockholders would be the owners of the property, and at the same time it would belong to the corporation. One stockholder owning the whole capital stock could of course do what several stockholders could lawfully do. It is said in *Ulton v. Churchill*, 33 N. Y. 161, "the interest of a stockholder is of a collateral nature, and is not the interest of an owner;" and in *Hyatt v. Allen*, *supra*, that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In *Winona, etc., R. Co. v. St. P., etc., R.*

Co., 23 Minn. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property and immunities. In *Baldwin v. Canfield*, 26 Minn. 43, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In *Bartlett v. Brickett*, 14 Allen, 62, an action of replevin was brought by A., B. and C., as the "Trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B. and C., trustees as aforesaid," became bound, and the officer in his return, certified that he had taken a bond "from the within-named A., B. and C.," and the property was receipted by "A., B. and C. plaintiffs." It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in *Van Allen v. Assessors*, 3 Wall. 584, "the corporation is the legal owner of all the property of the bank, both real and personal." In *Wilde v. Jenkins*, *supra*, where a copartnership bought all the property and effects, together with the franchises of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In *Mickles v. R. C. Bank*, 11 Paige, 118, it was held that although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not be until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In *Bennett v. Am. Art Union*, 5 Sandf. 614, it was held that "as a general rule, the whole title, legal and equitable (to its property), is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant as a shareholder in the Art Union, for an injunction against a certain disposition of its property was denied, because he had no interest in it. See also *Goodwin v. Hardy*, 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He

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may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. *Timp v. Dockham*, 32 Wis. 146; *Sensenbrenner v. Mathews*, 48 Wis. 250; s. c., 33 Am. Rep. 809. In analogy to the above principle it was held in *Murphy v. Hanrahan*, 50 Wis. 485, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy. The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

BY THE COURT. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

WOODWORTH V. MILLS.

(61 Wis. 44.)

Evidence — of character of plaintiff in malicious prosecution.

In an action for malicious prosecution, evidence of the plaintiff's good character is admissible on the question of probable cause.

ACTION for malicious prosecution on a charge of grand larceny. The opinion states the point. The plaintiff had judgment below.

Johnson & Ainsworth, J. M. Morrow and S. N. Pinney, for appellant.

Blackman & Bloomingdale and W. F. Vilas, for respondent.

TAYLOR, J. [Omitting other points.] There is but one other question as to the admissibility of evidence on the part of the plaintiff

which was objected to by the defendant, which we deem necessary to consider. On the trial the plaintiff was allowed to give evidence of his previous good character, as a part of his case, and not in answer to an attack upon such character by the evidence of the defense. This evidence was all objected to by the defendant. Upon this question the authorities are somewhat in conflict. This court has not heretofore passed upon the question, and we are therefore at liberty to adopt the rule which seems to us the more reasonable. The question seems to us to be this : In determining the probability of the guilt of a party charged with crime has his previous good character any bearing upon the question ? We think this question must be answered in the affirmative. The fact that it has weight in determining the question of guilt in all cases where there is any doubt of the guilt of the accused party, is the basis of the rule in criminal actions that the defendant may, in all such cases, and perhaps in all cases, give in evidence his previous good character. The fact that he has such character is some evidence, and often very conclusive evidence, of the innocence of the accused. When therefore a person is about to make a criminal complaint against a citizen of previously known good character and reputation, it is reasonable that he should consider that fact with the other facts and circumstances in determining the question of the probability of the guilt of the accused. If I lose my horse under circumstances which indicate that he has been stolen and shortly after he is found in the inclosure of a man who has the reputation of being a horse-thief, I might have probable cause for believing that that man had stolen him ; but if he was found under like circumstances in the inclosure of a man whom I knew to have sustained a good reputation for many years, there would be a question at least whether I would have probable cause to believe such man guilty of the theft. There are many cases which hold that in a civil action the character of the plaintiff is not in issue until the same is attacked by the defendant, and that until so attacked it is presumed to be good, and therefore there is no necessity or propriety in giving affirmative proof of such character. This as a general rule is undoubtedly the true rule ; but in an action for the malicious prosecution of a criminal action, where the main question in the case is whether the defendant had probable cause for instituting such proceedings, an exception should be made. In such action the plaintiff must prove a negative — that is, prove that the prosecutor did not have probable cause to believe

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him guilty of the offense charged ; and as bearing upon that question, he ought to be permitted to give evidence of his previous known good reputation. The following authorities are cited as sustaining our views on this question : *Blizzard v. Hays*, 46 Ind. 166 ; s. c., 15 Am. R. 291 ; *Israel v. Brooks*, 23 Ill. 575 ; *Wade v. Walden*, 23 Ill. 425 ; *Miller v. Brown*, 3 Mo. 127 ; *Bacon v. Towne*, 4 Cush. 217, 240 ; *Rodriguez v. Tudmire*, 2 Esp. 721. In the case of *Bacon v. Towne*, cited above, Chief Justice SHAW says : " The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of a notoriously bad character for honesty and integrity, would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation."

BY THE COURT. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

BUFFALO V. O'MALLEY.

(61 Wis. 265.)

Mistake — payment — voluntary — when not recoverable.

The plaintiff pre-paid the defendant for transportation of a pile of bark, which he estimated at sixty cords after allowing three cords for shrinkage. On arrival the bark measured but forty cords, measured in the usual manner at its destination. *Held*, that he could not recover back the excess paid. (*See note, p. 189.*)

ACTION for overpayment. The head-note states the facts. The plaintiff had judgment below.

Miles & Gleason, and *Miles*, for appellant.

Knight & Hayes, and *J. O. Hayes*, for respondent.

COLE, C. J. In whatever light this case is considered, we think the motion for a nonsuit should have been granted. There is no proof of fraud in the transaction, and as little of any mistake of fact for which the plaintiff is entitled to relief. The defendant was to be paid at the rate of \$2 per cord for carrying the bark in question from the place of shipment to Duluth. There is no dispute

but that this was the agreement. Now the contention of plaintiff is that under a mistake as to the quantity he paid the defendant for transporting sixty cords, when there was only forty cords according to the Duluth measurement. But there is not a *scintilla* of proof that the quantity of bark was to be ascertained or determined according to the manner of piling and measuring tan-bark at Duluth. It does not appear that either party so understood the contract as to the carriage. The plaintiff admitted that he measured the bark himself, when it was piled on the bank, and that there were sixty-three cords. When he paid for it he thought it would probably not fall short more than three cords. He supposed a cord of bark was a pile eight feet long, four feet high, and four feet wide, as it is. So on the bank where the bark was piled, it actually measured sixty-three cords, to the knowledge of the plaintiff. But the plaintiff seems to have been ignorant of the fact that where bark was curled badly, as his bark was, it was customary to make allowance for it in the measurement when sold; or to pile the bark tight by tramping it down and filling up the holes; and this was what caused the shrinkage in the bark when it was piled at Duluth for sale.

But as we have said, there is not a particle of evidence that the defendant agreed to transport the bark for \$2 per cord according to Duluth measurement. No such contract was made. Upon what ground then can the plaintiff claim the right to recover back part of the money which he paid the defendant for transportation? There were sixty cords or more according to the bank measurement, and the plaintiff admits that he was to pay at the rate of \$2 per cord for carrying it to Duluth. Suppose a part of the bark had been rejected by buyers in Duluth because not merchantable, could it be claimed the defendant must lose his transportation of the unsalable bark? There would be quite as much reason in claiming that the defendant should stand the loss in the case supposed, as there is in saying, upon the testimony in the record, he should be paid for only forty cords because there was a shrinkage of twenty cords when it was piled as required in the Duluth market. In truth, the evidence shows that there was no mistake as to the bank measurement, and we must assume, in the absence of all proof to the contrary, that the parties contracted with reference to that measurement. It follows from this that there was no overpayment.

Now to entitle the plaintiff to recover, he was bound to prove, either that there was a mistake in the bank measurement, that there was

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not sixty cords as there piled, or that the defendant agreed to carry the bark for \$2 per cord according to the Duluth measurement. Neither case was established by the evidence. It is needless to observe, courts do not relieve against every mistake a party may make in his business transactions. A mistake in a matter of fact, to be the ground of relief, must be of a material nature, inducing or influencing the agreement, or in some matter to which the contract is to be applied. It is obvious the mistake which the plaintiff made was in supposing that curled bark, piled in the loose manner his bark was piled, would hold out in measure when piled as dealers required. But this was a mistake as to a collateral fact, which had nothing to do with the contract of carriage. It is said the plaintiff paid for the carriage upon the belief that there were sixty cords of it, and that this belief was founded upon its having measured the bark on the bank. He certainly was not mistaken as to the quantity of the bark on the bank, but was mistaken in supposing that a dealer would take it at Dubuth piled in the manner he had piled it.

It is said that a cord of bark, *ex vi termini*, implies a cord, or 128 cubic feet; but the parties evidently did not use the word in such a sense when they were talking about the quantity on the settlement for the transportation at Duluth. They referred to the measurement on the bank,—the number of cords as the bark was there piled, and the proof is entirely conclusive that payment was made with reference to that measurement. It is certainly true that the bark was not there piled in as solid and compact a manner as the Duluth dealers required it to be; but what of that? There was no mistake of fact as to the bank measurement when payment was made, and no ground for relief shown.

It follows from these views that the nonsuit should have been granted.

BY THE COURT. The judgment of the Circuit Court is reversed, and a new trial ordered.

NOTE BY THE REPORTER.— See *Lewellen v. Garrett* (58 Ind. 442), 26 Am. Rep. 74; 33 Am. Rep. 204; 43 Am. Rep. 161; 1 Am. Rep. 66; 29 Eng. R. 590. The double payment by the county of fees and costs to a sheriff, through a mistake of the clerk in twice certifying to bills for the same services, is a mistake of fact upon the part of the board of supervisors, and the amount erroneously paid may be recovered *Holmes v. Lucas County*, 53 Iowa, 211; but see *Surdam v. Fuller*, 31 Hun, 500.

In *Neilsey v. United States* 17 Ct. Cl. Rep. 111, it was held that "in actions

to recover back money paid in mistake, a mistake of fact must be established, and ordinarily the mistake itself as such must be shown, and it must be a mistake of fact and not an error of judgment; but if the mistake relates to the measurements of a certain and fixed area, it may be established by showing that the area does not now contain the number of square yards for which payment was made."

In *Calkins v. Grissold*, 11 Hun, 208, the defendant, in pursuance of a contract made with the plaintiff, sold and delivered to him 53,939 pounds of grapes at one and a-half cents per pound. The plaintiff having paid a portion of the purchase-price, an accounting was subsequently had, at which neither party knowing accurately the weight of the grapes, or the crates in which they were delivered, and having no memoranda from which such weight could be computed, it was agreed to call the weight of the grapes 65,000, and that of the crates in which they were delivered 600 pounds. The plaintiff having paid the amount appearing to be due by these figures, subsequently brought this action to recover the price of the grapes erroneously admitted to have been delivered. *Held*, that as there was a mutual mistake of fact as to the weight of the grapes, plaintiff was entitled to recover back the money paid in consequence thereof, and his right so to do was not affected by the fact that the accounting amounted to an accord and satisfaction. In the case of the sale of milk by the can, if by mistake of the parties the milk delivered is short of the quantity intended, owing to the cans not holding the amount supposed, and the vendor receives more money on that account than entitled to, he must account for the same, even though the purchaser was negligent in discovering the mistake. *Devine v. Edwards*, 87 Ills. 177.

In *Budd v. Eyermann*, 10 Mo. App. 437, it was held that "where it appears beyond a reasonable doubt that the plaintiff was to pay for a certain judgment the amount due and collectible thereon, that unknown to either party, a portion of the judgment had been paid to the defendant's agent and that by mistake the plaintiff paid that sum in excess of his agreement, he is entitled, as matter of law, to recover back the excess." To same effect *Arcey v. Imson*, 3 Alb. L. J. 875.

In *Kingston Bank v. Ellinge*, 40 N. Y. 391 where a sheriff having received an execution issued upon the defendant's judgment, afterward upon a subsequent judgment of the plaintiff against the same party, and before the last had run out, but after the sixty days had expired as to the first, made a levy upon personal property not sufficient to satisfy both, sold it and paid over the proceeds to the defendant in satisfaction of his prior execution with the assent of the plaintiff, neither party knowing that that execution had run out before the levy, but supposing the contrary, *held*, that the latter could recover it back from the former as money paid under a mistake of fact, and this although either might have easily learned the truth by inquiry of the sheriff, and although the defendant's judgment had been in consequence of the receipt of the money canceled and discharged of record.

A party seeking to recover back money voluntarily paid, and without any fraud or imposition on the part of the payee, on the ground that the payment was made under a mistake of fact, must, in order to recover, have believed in

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and acted upon a state of facts, which belief turns out to be unfounded and the supposed facts untrue. He is not authorized to rescind an agreement merely because he has changed his mind in regard to a matter of policy, or has come to a better position, so far as the facilities and probable result of a defense to the payment are concerned. *Nat. Life Ins. Co. v. Jones*, 1 T. & C. 466, affirmed 59 N. Y. 649. In that case the officers of a life insurance company, against which a claim upon a policy had been presented, made an investigation from which they were led to believe that a defense to the claim existed, upon the ground of false and fraudulent representations and concealment of the insured person as to health, etc. Notwithstanding this belief they paid the claim, upon the ground, in part, that an unsuccessful resistance would injure the reputation of the company and prompt payment would be a benefit to it. *Held*, that the money paid could not be recovered back, on the ground that the payment was made under a mistake of fact, and a good defense to such payment by reason of the fraudulent representations, etc., actually existed.

MUSTER V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

(61 Wis. 325.)

Negligence — railroad — throwing mail-bags.

SUFFICIENTLY reported, 49 Am. Rep. 41.

HARE V. MARSH.

(61 Wis. 435.)

Damages — wealth of defendant.

In an action of assault and battery, it is improper to consider the defendant's financial means and public position on the question of compensatory damages.*

ASSAULT and battery. The head-note states the point. The plaintiff had judgment below.

Ellis, Greene & Merrill, for appellant.

W. J. Lander, for respondent.

* See *Morgan v. Durfee* (69 Mo. 469), 38 Am. R. 508; *Draper v. Baker*, post.

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CASSODAY, J. [Minor matters omitted.] After the trial judge had concluded his general charge to the jury he gave several instructions at the special request of the plaintiff's counsel. The second instruction so requested and given covered the subject of compensatory damages and the several items or questions to be considered in arriving at such damages. Then the court gave the two following instructions in the order given: "3. And in determining the amount of damages you may take into consideration the means of the defendant and his public position at the time of the assault, as postmaster and president of the village of Depere. 4. And besides the actual damages of the plaintiff under the rules laid down, you may also, if the assault was made willfully and maliciously, and without adequate provocation, add a reasonable amount to your verdict by way of punishment of the defendant, and beyond the actual damages suffered by the plaintiff." The defendant excepted to each of these instructions.

By these instructions the jury were in effect told that in determining the amount of actual or compensatory damages they might take into consideration the means of the defendant, and his public position at the time as postmaster and president of the village. What legitimate bearing the wealth or poverty of the defendant, his office, public position, or private station had upon the damages which the plaintiff had actually sustained, we are unable to perceive. The plaintiff's actual damages were what they were, and could neither be increased nor diminished by any conceivable position or circumstances of the defendant. The instructions given were in direct conflict with the whole current of authority in this State. To the authorities cited by counsel for the defendants others might be cited, but it is unnecessary. Had the court simply charged the jury that they might take into consideration the means of defendant on the subject of punitive damages, then the case would have come within the rule frequently recognized. *Lavery v. Crooke*, 52 Wis. 612; s. c., 38 Am. Rep. 768.

BY THE COURT. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

 Draper v. Baker.

DRAPER V. BAKER.

(51 Wis. 450.)

Evidence — of defendant's wealth — reputation.

On the question of punitive damages, in assault and battery, the defendant's wealth may be proved by evidence of reputation.*

ASSAULT and battery. The head-note states the point. The plaintiff had judgment below.

E. P. Smith and Nath. Pereles & Sons, for appellant.

Merton & Kearney, for respondent.

TAYLOR, J. [Omitting other matters.] It is not contended by the learned counsel for the appellant that it is not competent, upon a trial of this kind, for the plaintiff to give evidence of the financial condition of the defendant when the circumstances are such that the plaintiff may be entitled to recover punitive damages; but he insists that the financial condition of the defendant cannot be shown by proof of his reputed wealth, but must be confined to facts directly showing such condition. We think the objection was not well taken. Most of the cases hold that where the financial condition of the defendant may be shown in aggravation of the damages, the evidence shall be confined to the question of reputed wealth, and that evidence detailing or giving an inventory of the defendant's property is not admissible. *Stanwood v. Whitmore*, 63 Me. 209; *Kniffen v. McConnell*, 30 N. Y. 285; *White v. Murland*, 71 Ill. 250, 261; s. c., 22 Am. Rep. 100; 1 Suth. Dam. 744, 745.

In the case of *White v. Murland*, *supra*, the court say: "We would here observe that the practice has grown up, though not generally customary, of raising a sort of collateral issue upon the question of pecuniary circumstances, involving a detail as to lists, kind and value of property. This is not within the purpose or scope of its admissibility. The inquiry in the first instance should be general, whether the party be in poor, moderate, or good circumstances; if good, how good, leaving special inquiries to be made on cross-examination." This is the rule recognized in all the

*See *Hare v. Marsh*, *ante*.

courts which hold that the pecuniary circumstances of the parties may be given in evidence upon the general question of damages, both compensatory and punitive. And it would seem that where the pecuniary circumstances of a defendant are held to be admissible upon the question of compensatory damages, evidence of the actual wealth of the defendant should not be admitted; but where evidence of the wealth of the defendant is admitted for the purpose of enhancing the exemplary or punitive damages, the actual wealth of the defendant may be shown. This was so decided, and we think properly, in the case of *Johnson v. Smith*, 64 Me. 553. The point of that case is that where the plaintiff had made out a case which would entitle him to demand exemplary damages, and had given no evidence as to the financial circumstances of the defendant, the defendant might introduce evidence of his real financial condition as bearing upon the question as to the amount of the exemplary damages which the jury ought to assess against him; and that in such case the rule that the reputed wealth of the defendant could only be shown, did not apply. But the case does not decide that the plaintiff may not in such case show the reputed wealth of the defendant to enhance the exemplary damages; but it does hold that when no evidence is given on the subject, and impliedly that when such evidence is given, the defendant may answer it by showing his real financial condition.

We think the rule stated by the Illinois court is the true rule to be adopted. It is the only practical rule. In most cases evidence of reputed wealth would be the only evidence the plaintiff could make upon the point, and in cases where such reputed wealth is not to conclude the defendant he always has it in his power to present the real facts to the jury in answer to the general proofs of the plaintiff. In this case the evidence offered by the plaintiff upon the point could not have prejudiced the defendant. The fact appeared, even on the evidence of the plaintiff's witness, that when the cause of action arose in this case the defendant had very little property except his homestead, and the value of that was not shown by either party. The reputation of the defendant for wealth, as stated by plaintiff's witness, was a reputation he had before he had distributed his property amongst his heirs.

BY THE COURT. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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WATERMAN V. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

(61 Wis. 404.)

Statute — "trustee of express trust" — consignee

One described in a contract of carriage as consignor, consignee and sole owner, is "a trustee of an express trust" within the statute of parties, and may maintain an action to recover overcharges paid. (*See note, p. 148.*)

ACTION to recover back overcharges exacted by a common carrier. The head-note states the point. The plaintiff had judgment below.

Fuller & Fuller and Burton Hanson, for appellant.

A. S. Spooner, for respondent.

CASSODAY, J. Notwithstanding the plaintiff is described in the contract of carriage as consignor, consignee and sole owner, yet the defendant seeks to escape liability for the repayment of the excessive exaction on the sole ground that the plaintiff was not the owner of the property and did not personally furnish and pay the overcharge. Is such a defense available?

The question has elicited much discussion and the adjudicated cases upon it present a considerable disagreement. We make no attempt to reconcile an irreconcilable conflict. It is enough to know that our conviction as to the law applicable has the sanction of respectable authority, and especially under our statute as it has been construed by this court. The question is not whether the owner could have maintained the action, for he did not bring the action. There seems to be no dispute, that where there is nothing appearing to the contrary, the consignee is presumed to be the owner of the property and as such may maintain an action for its loss or depreciation in value by reason of the negligence of the carrier. Undoubtedly this presumption may be overcome by evidence. A consignor may have a right of action against the carrier by reason of ownership. So he may have such right of action on privity of contract. The contract seems to be controlling, at least to a certain

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extent, in all cases. *Evans v. Marlett*, 1 Ld. Raym. 271, *Davis v. James*, 5 Burr. 2680; *Mason v. Lickbarrow*, 1 H. Bl. 357; *Moore v. Wilson*, 1 Term Rep. 659; *Joseph v. Knox*, 3 Camp. 320; *Dunlop v. Lambert*, 6 Clark & F. 600; *Freeman v. Birch*, 3 Q. B. 492; *Blanchard v. Page*, 8 Gray, 281; *Finn v. Western R. Corp.*, 112 Mass. 524; s. c., 17 Am. Rep. 128; *Carter v. Graves*, 9 Yerg. 446; *Northern Line Packet Co. v. Shearer*, 61 Ill. 263; *Southern Exp. Co. v. Craft*, 49 Miss. 480; s. c., 19 Am. Rep. 4. A careful analysis of these cases will be found in a well-written article by Judge Pierce, of Tennessee, in 7 South. Law Rev. (N. S.), 255-283.

It appears that much depends upon the nature of the act complained of and the character of the action. Thus in *Carter v. Graves*, *supra*, it was said "that in all actions on the case against a carrier for a loss or injury done to property, the wrong is the gist of the action and the contract to deliver collateral to it. In all actions of *assumpsit* for not delivering according to contract, the contract to deliver is the gist of the action, and the loss or injury sustained is collateral thereto." In several of the cases above cited an action for the breach of the contract was maintained by a party to the contract having no ownership or interest in the property carried. Thus, in *Joseph v. Knox*, *supra*, the plaintiffs had no ownership nor interest in the goods, but as shippers were parties to the contract, and it was held that they might maintain the action upon the bill of lading for the failure to carry and deliver. Lord Chief Justice ELLENBOROUGH observed that "there is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs and that the freight for them was paid by the plaintiffs in London. To the plaintiffs therefore, from whom the consideration moves and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his [the carrier's] agent, he cannot say to the shippers they have no interest in the goods and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner."

So in *Hooper v. Chicago, etc., Ry. Co.*, 27 Wis. 91; s. c., 9 Am. Rep. 439, it was said that "the shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to

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recover the damages, unless it be shown that the consignee objects ; for without that it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal."

Here the defendant contracted solely with the plaintiff. In the contract the defendant, with full knowledge of the facts, recognized the plaintiff as sole owner of the property. The freight had been fully paid in behalf of the plaintiff. To him the defendant, in consideration of such payment, expressly agreed to deliver the property at the place of consignment. This express agreement was broken by the refusal to so deliver except upon condition of a further payment of an unauthorized exaction. This unauthorized exaction was complied with when the delivery was made. Having broken the contract and received the overcharge in consequence of the breach, the defendant seeks to escape liability for the breach on the ground that the only party with whom it contracted was not in fact the owner of the property, and did not personally furnish and pay the overcharge exacted as a condition of the delivery. To hold such a defense available would, in effect, abrogate an express written contract. One exception to the statutory rule that "every action must be prosecuted in the name of the real party in interest" (§ 2605, R. S.), is that a "trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted." § 2607. "A trustee of an express trust, within the meaning of this section," must "be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." By amendment these provisions have been made applicable to actions brought in a justice's court, as this was. Subdivision 27, § 2, chapter 194, Laws of 1879. If the consignor or shipper could properly be "regarded as a trustee of an express trust," under this statute, as held in *Hooper v. C. & N. W. Ry. Co.*, *supra*, then certainly the person described in the contract as consignor, consignee and sole owner, and for whom the freight has been paid, must also be regarded as a trustee of an express trust under the statute. *Allen v. Kennedy*, 49 Wis. 549.

BY THE COURT. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

DeWolf v. Lawson.

NOTE BY THE REPORTER.—In *Peters v. Railroad Co.*, 42 Ohio St. 275, it was held that a shipper has a right to have his goods transported at legal rates over the usual line of a common carrier of such goods; and if to procure the services of such carrier the shipper is compelled to pay illegal rates established by the carrier, the payment is not such a voluntary payment as will preclude recovering back the illegal charge; nor will it preclude such recovery if the payments, by arrangement of parties, are made at the end of each month.

DEWOLF V. LAWSON.

(51 Wis. 489.)

Statute — “charitable corporation” — religious society.

A religious society is not a “charitable corporation.”

ACTION to construe a will. The opinion states the point.

A. S. Spooner, and *T. D. Weeks*, for appellant.

H. T. Sharp, and *Fish & Dodge*, for respondents.

COLE, C. J. [Omitting other questions.] This brings us to the question whether the trust in clauses 11 and 12 can be sustained under the exception in section 2039; in other words, can it be fairly said that a trust for a term of years, for the benefit of the trustees of the Baptist and Methodist societies of Delavan, is a devise of real estate to a “literary or charitable corporation,” and for the “sole use and benefit” of such corporation, within the meaning of that exception? It seems to us not. We think the charitable corporation there referred to is not a religious corporation. True, it is sometimes said, in analogy to the statute of Elizabeth (43 Eliz. chap. 4), that a corporation for a charitable purpose may include a trust, among other things, for the following persons or purposes: for building or repairing or ornamenting a church; distributing Bibles or religious books; for a minister for preaching; and generally, any public religious object whatever, provided the religion was not one subversive of good morals. Marsden’s Perpetuities, 296. But in this exception the words “charitable corporation” are

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not used in any such broad sense. They are not intended to include a corporation organized and existing for religious and spiritual purposes, as the trustees of the Baptist and Methodist societies clearly are. This amendment to section 15, chap. 83, R. S. 1858, as the revisers in their notes say, was made to allow grants or devises in perpetuity to literary and charitable corporations organized under the laws of this State. They did not think it best to extend the exception so as to include religious corporations, but leave it to apply only to those which are formed for advancing literary or charitable ends. We have no doubt the legislature, in enacting the section, intended this construction should be placed upon the exception. It was not contemplated that the words "charitable corporation" should be so enlarged as to include what is generally called a religious corporation. The cause is remanded to the court below for further proceedings according to this opinion.

BY THE COURT. Ordered accordingly.

Judgment accordingly.

CASSODAY, J., dissents.

CITY OF RACINE V. CROTSENBERG.

(61 Wis. 481.)

Municipal corporation — ejectment for street.

A city cannot maintain ejectment for a street the fee of which it does not own.*

EJECTMENT. The opinion states the point. The defendant had judgment below.

Samuel Ritchie, for appellant.

Hand & Flett, for respondent.

LYON J. In *Kimball v. Kenosha*, 4 Wis. 321, it was settled that in this State a grantee of a lot bounded by a street in a village or city, laid out, platted and recorded in conformity with the statute, takes to the centre of the street on which the lot abuts, subject to

* See *Armstrong v. City of St. Louis* (69 Mo. 309), 33 Am. Rep. 499; *City of Marshall v. Anderson*, 78 Mo. 85; *Hoboken v. Mayor*, 36 N. J. L. 540.

the public easement. The fee of the street is in the abutting owner, and the interest of the public therein, which the city or village holds in trust for it, is not a fee, but a mere easement. *Goodall v. Milwaukee*, 5 Wis. 32; *Milwaukee v. Mil. & B. R. Co.*, 7 Wis. 85; *Ford v. C. & N. W. R. Co.*, 14 Wis. 609.

In *Gardiner v. Tisdale*, 2 Wis. 153, and again in *Weisbrod v. C. & N. W. Ry. Co.*, 21 Wis. 602, it was held that the owner of the fee of a street might maintain ejectment against a permanent incumbrancer or occupier, inconsistent with or repugnant to the purpose of the public easement.

The above rules have never been shaken, and are firmly imbedded in the jurisprudence of this State. These rules are decisive of this action, for no one will contend that an action of ejectment will lie to recover a mere right of way. Such an easement is incorporeal in its nature (Washb. Easem. 3), and ejectment lies only to recover things corporeal, which may be the subjects of seisin, entry and possession. There can be no seisin of an incorporeal hereditament and it cannot be the subject of entry or possession. It "lyeth in grant, and not in livery." Sedg. & W. Tr. Title to Land, §§ 95-98, 146, and cases cited. The plaintiff has an ample remedy under its charter. It may summarily remove obstructions to its streets, and doubtless has other remedies, but it cannot maintain ejectment.

It is not alleged in the complaint whether Crottsenberg is the owner in fee of the premises claimed. But it is immaterial whether he is or is not such owner.

The statute (R. S. §§ 3077, 3084) clearly indicates the scope and limitations of the action of ejectment in this State. Section 3077 requires the plaintiff to state particularly the nature and extent of his estate or interest in the lands claimed, "whether in fee, dower, for life, or for a term of years, specifying such life or lives, or the duration of such term, and that he is entitled to the possession of such premises, and that the defendant unlawfully withholds the possession thereof from him." Section 3084 requires that the verdict (if for the plaintiff) shall specify the estate established on the trial by the plaintiff, "whether it be in fee, dower, for life, or for a term of years, specifying such life or lives, or the duration of such term." Subd. 7.

This complaint shows affirmatively that the plaintiff is not the owner in fee, or for life, or a term of years, of the lands claimed,

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and also that the defendants do not withhold the possession thereof from it in the sense in which the word "possession" is employed in the statute.

The case was very ably argued by counsel on both sides, and numerous adjudications elsewhere were cited by them in support of their respective positions. But the uniform decisions of this court, extending over a period of more than thirty years, are conclusive of the question here determined, and it is unnecessary to comment upon those adjudications.

BY THE COURT. The order of the Circuit Court is affirmed.

Judgment affirmed.

MATHEWS V. CASE

(61 Wis. 491.)

Master and servant—fellow-servants—mate and master of vessel.

The master of a vessel and the mate are fellow servants.*

ACTION for personal injury by negligence. The head-note states the point. The plaintiff had judgment below.

Charles H. Lee, and Markham & Noyes, for appellants.

W. J. Turner, for respondent.

COLE, C. J. This is an action for a personal injury. The defendants were the owners of the schooner J. I. Case, a vessel duly enrolled and licensed for the coasting trade. The plaintiff was employed by the defendants as mate, and one Gray was employed as master. It is stated in the complaint that on August 3 the schooner started on a voyage from the port of Milwaukee to Escanaba, thence to Lake Erie. On the 6th of August, at Escanaba—the defendants not being present—the master, having the exclusive control and direction of loading a cargo of iron ore, negligently loaded and overloaded the same, and then proceeded on the voyage; that in consequence of such negligent loading and overloading, the vessel

* See *Chic., etc., Ry. Co. v. Swanson* (16 Neb. 254), 49 Am. Rep. 718.

sprung a leak; that on August 10 the vessel encountered a storm, and leaked badly by reason of the negligent loading; that it was the plaintiff's duty to obey the orders of the master; that at this time the schooner had not the usual appliances for carrying and securing the yawl-boat on deck; that the same being rotten and unseaworthy, was negligently placed on the deck by the master's orders, and negligently left without being fastened so as to prevent it from moving about in case water was washed aboard or the vessel rolled. This being the situation, and the hatch near the yawl-boat not being fastened down securely, the master took the wheel, and the plaintiff, as was his duty, proceeded to batten down the hatch carefully. While so engaged, the vessel, having a large amount of water in her hold, and being improperly loaded, and the yawl-boat being negligently on the deck, without proper appliances for fastening, the master negligently steered the vessel into a trough of the sea, the vessel rolled, and large quantities of water came on deck and washed the yawl-boat against the plaintiff and broke his leg.

These are the material allegations stating the cause of action. It will be seen that whatever negligence there was, either in improperly loading the vessel, or in placing the yawl-boat on deck without securely fastening the same, or in negligently steering the vessel into the trough of the sea, was the negligence of the master alone. There is no averment that the vessel was not properly equipped when she left the port of Milwaukee. It is only alleged that when the schooner encountered the storm there were not the usual and proper mechanical appliances upon the vessel for carrying and securing the yawl-boat on deck. But *non constat* such appliances had not been furnished by the owners. If there were any omission of duty on the part of the owners in that regard, or in equipping the vessel properly at the outset of the voyage, or in the selection of a competent master, the fact should have been distinctly alleged. But the inference is irresistible, from the facts stated, that the injury was caused solely by the negligent acts of the master — unless there was contributory negligence against which the owners could not guard. The owners were not present, and it was impossible for them to attend to the loading of the vessel or to direct her management on the voyage. From the necessities of the case these duties had to be intrusted to the master and crew. On what ground then can it be claimed that the owners are responsible to the plaintiff

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iff for an injury resulting from the negligence of the master in loading and managing the vessel? Were not the mate and master fellow-servants, engaged in the same employment or common service? It seems to us they must be so regarded, and that the case comes within the familiar rule of law, which has been so frequently announced by this and other courts, that the employer is not responsible for an injury occasioned to one employee through the negligence of another employee engaged in the same service or undertaking. There is no fact stated which will take the case out of that rule of law.

The decision in *Thompson v. Hermann*, 47 Wis. 602; s. c., 32 Am. Rep. 784, is relied on to sustain the action; but the facts of that case are quite dissimilar to those stated in this complaint, as was shown by defendant's counsel on the argument. That was an action by an ordinary seaman against the owners, one of whom was the master, for an injury caused by the negligence or unskillfulness of the master. There was a joint demurrer to the complaint, on behalf of all the defendants, which was sustained in the court below. This court overruled the order, holding the complaint sufficient. There the master ordered the plaintiff to adjust the rigging in a dangerous manner, though the plaintiff protested and suggested a safe way of adjusting it. But the master refused to adopt the safe course, and imperatively ordered the work to be done in a dangerous manner. The plaintiff, while in the careful discharge of his duty, obeying the master's order, fell and was injured. It was held that the plaintiff might recover on the facts stated. The decision is placed mainly on the peculiar character of the employment, and the relations existing between the master and a common seaman of a merchant vessel outside of port. But as we understand, the relations of mate and master are somewhat different from that the master holds to a common seaman. The mate in some cases exercises the functions of the master. He has more or less control in the loading and management of the vessel. It is his duty to exercise more or less superintendence over everything. It was his duty here to batten down the hatch, and in doing so to use care and discretion. He could see that the yawl-boat was not securely fastened and was liable to be thrown against him. He might have used means to prevent such an accident; but this he did not do. In any view which we have been able to take of the complaint, we think it fails to state a cause of action.

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BY THE COURT. The order of the Circuit Court overruling the demurrer is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

WHITE V. MILWAUKEE CITY RAILWAY COMPANY.

(61 Wis. 583.)

Evidence—personal examination of party

In an action for personal injuries, the court may at the trial compel the plaintiff to submit to a surgical examination. (*See note, p. 156.*)

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

E. P. Smith, Rogers & Mann and J. M. Pereles, for appellant.

R. K. Adams, for respondent.

LYON, J. [Omitting other questions.] The testimony of the plaintiff and some of her witnesses tends to show that at the time of the trial she had not recovered from the effect of the injuries; that her limb was not then in a normal condition; and that the effect of such injuries would or might be permanent. She testified that five physicians had examined her limb, among whom was Dr. Hare. During the trial counsel for the defendant made the following request, and the following proceedings were thereupon had: "Defendant's counsel.—We ask of the court to direct the plaintiff, who is now present, to submit her limb for examination in a private room attached to the court room, privately, to Drs. Senn and Hare, who are now present, and that if she wish she can be accompanied by any of her own female friends who are present, or any other physician whom she chooses. Court—I do not see any thing improper in the request, but I do not think I have any authority to compel a suitor to submit, in a case of this kind, to any examination against his or her will; I therefore refuse the application. Defendant excepts. Plaintiff's counsel says: 'The plaintiff herself declines to have the examination in the absence of her phy-

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alcain, who as her attorney is informed and believes, has left the city since he has been on the witness stand.'”

It will be seen that the court denied this request on the sole ground that he had no authority to compel the plaintiff to an examination against her will. On principle and authority we are satisfied that this was error. The then condition of the injured limb had a most important bearing upon the question as to whether the plaintiff's injuries were permanent, and an examination at that time, the results of which would have been put in evidence before the jury, would in all probability have greatly aided them in determining the extent and consequences of the injury. It would be, or might have been more satisfactory and conclusive evidence on that subject than the statements of the plaintiff, or the opinions of the medical witnesses. The application for her examination contained in it every reasonable safeguard against offending the modesty or delicacy of the plaintiff, and although she might shrink from the examination, yet the ends of justice imperatively demanded that she submit to it. Such examinations are frequently ordered by courts in cases of divorce for impotency, and in cases of alleged pregnancy, and the authority of the court to order them has never been questioned, so far as we are advised.

In *Walsh v. Sayre*, 52 How. Pr. 334, the power of the court in a proper case to order a personal examination is asserted, and it is there said that it rests upon the same principle as does the power to compel the discovery of books, papers and documents, the difference being that in a case like this the principle extends to things or substances as well. *Schroeder v. C., etc., R. Co.*, 47 Iowa, 375, is to the same effect. The opinion of BECK, J., in that case, and of JONES, J., in *Walsh v. Sayer, supra*, contain very able and satisfactory discussions of this question.

It is said by the learned counsel for the plaintiff that it rests in the sound discretion of the court to order or refuse an examination. Perhaps it does. But that discretion has not been exercised here. The court expressly denied the application because of alleged want of power to grant it. We hold that in a proper case the court has power to order an examination, and that this is a proper case in which to exercise it.

By THE COURT. The judgment of the County Court is reversed and the cause will be remander for a new trial.

Reversed and remanded.

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NOTE BY THE REPORTER.—See note, 49 Am. Rep. 191; 19 Eng. R. 617.

In *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, it was held not error for the trial court to refuse to allow the jury to witness experiments with cars upon a railway track outside the court-room, on the question of the possibility of an alleged collision. The court pronounced the matter one of discretion.

In *Cooke v. Solance, etc., Manuf. Co.*, 29 Hun, 641, reversed by Court of Appeals, June 2, 1885, but on other grounds, plaintiff brought suit to recover damages for injuries sustained by him while working upon a machine as an employee of the defendant. The latter procured an order for the examination of the plaintiff before trial. Upon an affidavit made by plaintiff's attorney, stating among other things that he could not cross-examine his client on the examination before the trial, or comprehend such examination without a previous inspection of the machine, an order was made directing the defendant to allow plaintiff's attorney to inspect the machine, and staying the examination of plaintiff until after such inspection. *Held*, that the court had no power to make the order.

In *Neuman v. Third Ave. R. Co.*, 50 N. Y. Super. Ct. 412, an order granted requiring plaintiff to submit to a physical examination was reversed, the court disapproving *Walsh v. Sayre*, 52 How. 384, cited in principal case, and approving *Roberts v. Ogdensburgh, etc., R. Co.*, 29 Hun, 155.

A prisoner on trial for crime cannot be required, against objection to try on a shoe to determine whether tracks found at the scene of the offense were his own; nor if he objects can he properly be required to measure the shoe after trying it on. But if he tries it on without objection, the ruling that he must measure it is not prejudicial error, as any witness could do it as well as he. *People v. Mead*, 50 Mich. 328.

The submission by a female defendant of her person to a private examination by physicians, is not a confession, although the result of the examination was a disclosure of facts of a criminative character; and such facts are competent evidence against her, although she was induced to submit to the examination through the assurance that, "It would be the best thing for her that she could do." *Spencer v. State*, 69 Ala. 159.

In *Turnpike Co. v. Baily*, 87 Ohio St. 104, the court said: "In an action to recover for personal injuries caused by the negligence of the defendant, the court has power to require the plaintiff to submit his person to an examination by physicians and surgeons when necessary to ascertain the nature and extent of the injury.

"On the refusal of the plaintiff to comply with such order when properly made, the court may dismiss the action, or refuse to allow the plaintiff to give evidence to establish the injury.

"The dismissal is authorized by section 5314, Revised Statutes. Authority to exclude the evidence arises out of the inherent power of the court over the subject under investigation. *Schrader v. C. R., I. & B. R. Co.*, 47 Iowa, 375.

"The refusal of the court to order such an examination of the plaintiff will not be *presumed* to have been based on the ground of a want of power in the

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court to make the order, but in the absence of any showing to the contrary, on the ground that under the circumstances the order ought not to have been granted.

"The application for such order ought to be so made as not unnecessarily to prolong the trial, or to prejudice the plaintiff in proving his case. Hence where the application is not made until after the close of the plaintiff's evidence in chief, and the commencement of the introduction of the defendant's evidence, and no reason is shown for the delay in making the application, it may be refused on that ground." See *Shaw v. Van Rensselaer*, 60 How. Pr. 148.

In *Atchison, etc., R. Co. v. Thul*, 44 Am. Rep. 659, it was held. "In an action of damages for permanent injury to the eyes, the plaintiff having testified, and no medical expert having testified, the court may order the plaintiff to submit to an examination by a competent expert."

In *Osborn v. Manhattan R. Co.*, 5 N. Y. Monthly Law Bulletin, 8, the motion was granted so far as to allow the examination of the plaintiff to be made by a physician to be named in the order. Any physician upon the part of the plaintiff to be allowed to be present.

MEINCKE V. FALK.

(61 Wis 622.)

Contract — to build carriage like model — compliance — estoppel.

On a contract to build a carriage just like a model, substantial compliance is sufficient; unimportant differences will be disregarded.*

The refusal of the buyer to accept the carriage solely on the ground that the contract was illegal, estops him from afterward raising the objection of non-compliance.

ACTION on contract. The opinion states the case. The defendant had judgment below.

John A. Wall, for appellant.

Cotzhausen, Sylvester & Scheiber, for respondent.

COLE, C. J. The learned Circuit Court in this case directed a verdict for the defendant, because it appeared from the testimony that the carriage made and tendered for the defendant's intestate was not just like the Ball carriage, which was the model selected.

* See *Thoubboron v. Lewis* (48 Mich. 685), 33 Am. Rep. 218.

The plaintiff testified that the order was for a carriage just like the Ball carriage. He said there were some differences between the carriage in question and the Ball carriage, which he deemed improvements, though the body, style, size, and general appearance of the two carriages were alike. But the Circuit Court ruled, in effect, that the plaintiff was bound to furnish a carriage just like the Ball carriage, and if it was not so the defendant was not obliged to receive it; that in order to recover the plaintiff must show that he fulfilled his contract; that a family carriage was an article of luxury, which was governed by peculiar rules, and that a substantial compliance with the contract was not sufficient.

We think the court erred in not submitting the case to the jury upon the evidence given on the trial. Doubtless the plaintiff was bound to show that the carriage tendered was as good in every respect as the model; that in style, size, general appearance, etc., it was like it. Or to state the proposition in the usual form, the plaintiff could not recover unless he showed a full and substantial compliance with the contract on his part. It was essential that the carriage tendered should be as good in all respects as the model, and conform in size, style, and appearance to it. This we think was what the parties understood by the contract; nothing more. To say that the parties intended that the two carriages should be precisely alike in every unimportant particular, that there should not be the least difference between them in any part, however slight, would be placing upon the language used a forced and unreasonable construction. It is impossible for any mechanic to make even two spokes precisely alike, so that a glass, or possibly the naked eye, cannot detect some slight difference between them.

One of the witnesses, on the part of the defendant, who was a carriage-maker, testified, in substance, that if he should receive an order to make a carriage just like another, he should feel bound to build one as good in every respect as the model, and as much better as he could, of the same general style, appearance, and dimensions; but in the absence of any such testimony as to how a carriage-maker would understand the order, we think men ordinarily would attach such a meaning to the language and understand that the carriage tendered should fully and substantially conform to the model in all essential particulars as above indicated. That there was testimony of performance of the contract as thus construed sufficient to carry the case to the jury on this point is clear.

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Besides it must be borne in mind that the defendant did not refuse to accept the carriage because it was not such as was ordered; but the refusal to accept was placed upon the distinct ground that no legal contract had ever been made to purchase the carriage. The case was litigated upon this ground alone, as the elaborate opinion of Mr. Justice CASSODAY on the former appeal shows. See 55 Wis. 427; s. c., 42 Am. Rep. 722. Now the defendant seeks to change his position and justify the refusal to accept on the ground that the carriage tendered was not such as was ordered; that it did not comply with the contract. This objection, at this late day, comes with bad grace, and is hardly consistent with the rules of good faith and honest dealing. The defendant should have said, when the carriage was finished and he was called upon to take it, that it was not such a carriage as he had contracted for—that it was not like the Ball carriage, and objected to receiving it on that ground. But this he did not do. The refusal to accept was placed upon the ground that he never bought the carriage and did not want it. This furnishes an additional reason for submitting the case to the jury upon the evidence given on the trial.

BY THE COURT. The judgment of the Circuit Court is reversed, and a new trial ordered.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

CRAFT V. COMMONWEALTH.

(81 Ky. 230.)

Evidence — of dead witness — subsequent contradictory statements.

Where the testimony of a deceased witness is reproduced, it is not competent to show that he had confessed that his evidence was false. (*See note, p. 163.*)

CONVICTION of murder. The opinion states the point.

Z. F. Smith, Jr., and R. C. Burns, for appellant.

P. W. Hardin, attorney-general, and K. F. Pritchard, for appellee.

HINES, J. This is an appeal from a sentence of death on a conviction for murder. The case was here before on an appeal from a like sentence, and reversed because of the failure of the court properly to instruct the jury as to the weight to which the testimony of an accomplice is entitled. Opinion delivered September 12, 1882, and reported in 80 Ky. 349.

On the first trial one Ellis, an accomplice, testified, on behalf of

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the Commonwealth, to the guilt of appellant, but died before the last trial, on which trial the Commonwealth gave in evidence to the jury the statements of Ellis made at the former trial. Appellant then offered testimony to the effect that Ellis, subsequent to the first trial, had stated that the evidence given by him on the first trial inculcating appellant was false. This evidence the court rejected, and the correctness of that ruling is the only question we need inquire into on this appeal.

In this State it is settled, in harmony with the adjudications in the majority of the States, that before evidence can be adduced to impeach a witness by proof of statements contradictory of what he has testified, he must be inquired of as to such statements, with circumstances of time, place and persons present. This rule is established in civil cases by the Code, and in criminal prosecution by an unbroken line of decisions.

It is insisted for appellant that this rule does not apply when the witness sought to be impeached is dead. In this State there is no reported case in which the question has been presented, but there are numerous cases in which the evidence of a deceased witness, both by deposition and orally, has been reproduced, and this fact is strongly per-vasive that such impeaching testimony has been uniformly considered incompetent, since it could not have been introduced without making it an exception to the well established rule that the witness sought to be impeached must first be inquired of as to the circumstances of time and place of the contradictory statements. The reason of the rule is, that the witness attempted to be impeached may have an opportunity to contradict or explain such alleged statements. Such evidence is an exception to the well-recognized rule that hearsay evidence is not competent, and is only admitted upon the condition that this opportunity of contradiction or explanation be had. If such an exception were allowed to the general rule excluding hearsay evidence, there would be a strong temptation to the fabrication of evidence by which important and true evidence might be destroyed. An exception to this rule has been contended for in the admission of the declaration of a deceased witness to a deed or will, in disparagement of the evidence afforded by his signature, but has been disallowed. Greenl. Ev., § 126.

Even in an *ex parte* proceeding for the probate of a will, where the opposite party had no opportunity to cross-examine the witness, the courts have refused to allow the deceased witness to be im-

peached by proof of statements in conflict with his evidence given under oath. *Runyan v. Price*, 15 Ohio St. 1.

In the case of *Stacy v. Graham*, 14 N. Y. 498, the testimony of a witness had been taken *de bene esse* and read on the trial, whereupon the defendant offered to prove conversations with that witness after his examination, in which he confessed that his evidence was false; that it had been given under threats, and that he regretted having testified as he had. The court refused to permit the impeaching testimony to be heard, and in the opinion said: "Nor can we, in the present case, admit a distinction founded on the circumstance that the admissions of the witness were made, as alleged, after he had been examined. I cannot perceive that the reasons on which the rule in question is founded lose any of their force in such a case. And not only do those remain unimpaired, but there is an additional one to be found in the temptation held out to tamper with witnesses after their evidence has been given. I can conceive of nothing more dangerous in principle than the doctrine contended for. When a witness has been examined and cross-examined, if we allow him to be approached afterward, and declarations to be drawn from him inconsistent with his testimony, and then receive those in evidence without the protection which the rule affords, there will be no safety in trials. When the first experiment of this kind shall be sanctioned by the courts, there is no doubt that it will be often repeated, and with greater or less success."

It does not matter that in the present case the witness sought to be impeached was an accomplice, notwithstanding the fact that under our Code his evidence is not admissible unless corroborated. When his evidence is corroborated, he occupies the same attitude of any other witness so far as the method of contradicting or impeaching him is concerned. In this case there is corroborating evidence sufficient to have permitted the jury to consider the evidence of the accomplice, and the jury are the sole judges as to what weight should be given to such corroborating testimony.

Judgment affirmed.

NOTE BY THE REPORTER — See *Kirby v. Com.* (77 Va. 681); s. c., 46 Am. R. 747. When in the trial of a criminal case in the Circuit Court, the written examination of a witness (who has since died) before the committing court is read as evidence against the accused, he may impeach the evidence by proof of previous contradictory statements made by the witness, provided that he was interrogated, in the examining court, of such contradictory statements,

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with a proper specification of the time and place they were made; and if the written examination fails to show that such foundation was laid for impeaching the witness, the committing magistrate may amend it, to show the fact. *Griffith v. State*, 87 Ark. 324.

NIX v. CALDWELL.

(81 Ky. 283.)

Libel — privileged communication — to Masonic lodge.

The defendant made an affidavit that the plaintiff, who had testified on a trial before a masonic lodge, was not to be believed on oath. This was at the request of the party on trial. Neither party to this action was a mason. *Held*, not privileged.*

ACTION for libel. The opinion states the case. The defendant had judgment below.

Geo. C. Drane, for appellant.

Smith & Needham, for appellee.

PRYOR, J. This action was instituted in the Grant Circuit, and by change of venue heard in the Scott Circuit. It was brought by the appellant Nix, against the appellee Caldwell, for an alleged libel published by the latter, affecting injuriously the character of the appellant. The libel was in the form of an affidavit, voluntarily given by the appellee, at the instance of a member of the Stewartsville Lodge of Masons, to be read on the trial of one of its members.

The accusation pending was against one Redman, and the appellant (plaintiff below) had testified before a committee of the lodge with reference to the charge, and the appellee at the request of the party on trial, as well as a committee of the lodge, was sworn by a justice of the peace, and made an affidavit under his signature, in substance, "that the appellant was a man of bad character, and so regarded by his neighbors, and he would not believe him on oath."

The appellee pleads:

* See *Kirkpatrick v. Eagle Lodge* (26 Kans. 884), 40 Am. Rep. 316.

First. That what he stated was then and is now true.

Second. That the affidavit was made in good faith, believing the same to be true, and without malice or any intention on his part to injure the plaintiff, but for no other purpose than to give to the lodge the information he thought, in good faith, he had of and concerning the appellant's character, all of which was done in a prudent and confidential manner, without malice, and in the discharge of a social and moral duty, etc.

The appellant and the appellee were not members of the lodge, and so far as the record shows, were not members of the order.

The appellant objected to the filing of the amended answer containing the second ground of defense, and also objected to an instruction embodying the legal proposition presented by the amended answer; but his objections were overruled, a trial had, resulting in a verdict and judgment for defendant (appellee).

The court in the instruction said, in substance, to the jury "that if the defendant, at the time he gave the affidavit, testified in good faith, and to what he believed to be true concerning the plaintiff's character, and without any intention to injure the plaintiff, the publication complained of was privileged and excusable in law."

The words published were actionable, and if the defense in the amended answer brings the case within the rule of privileged communications, then before the appellant can recover, although the words published may be untrue, he must show the existence of express malice.

The rule laid down in Townshend to the effect that "every one who believes himself to be possessed of knowledge, which if true, does or may affect the rights and interests of another, has the right, in good faith, to communicate such, his belief, to that other, and whether or not he has personally any interest in the subject matter of the communication," is certainly very broad and comprehensive in its meaning, but certainly cannot apply to the character of case being considered. It is also said by Starkie that "communications made in confidence to persons interested, or by those interested, supposing them to be true, will relieve the party making them from responsibility, in the absence of express malice." 1 Stark. Slander, 321.

This doctrine applies to cases which where the parties, by reason of their relation to each other, are interested in the subject-matter of inquiry, such as communications made by the agent to the prin-

cipal, the father to the son, or communications by one stranger to another upon inquiry as to the standing of those who are seeking places of trust or confidence; such are regarded when made in good faith, as privileged, and so in cases where the well-being of society requires that a party in possession of what he supposes to be facts should disclose them. The authorities however are conflicting as to the responsibility of a stranger making a communication to another where there is no common interest in the subject-matter, and the interest is confined solely to the party receiving the communication.

In the cases of *Coxhead v. Richards*, 2 C. B. 569; s. c., 31 Am. Rep. 708, and *Bennett v. Deacon*, 2 C. B. 628, the court was equally divided on the question as to whether a stranger could volunteer to give the information. See also *Lewis v. Chapman*, 16 N. Y. 369. It is well settled, where the common protection and welfare of society requires that the communication should be made, that when made, in the absence of actual malice, it must be regarded as privileged; but we find no case going to the extent of adjudging that the belief of one as to the standing of another for truth and veracity with his neighbors, however honest the conviction, will justify a publication to the world that the man's reputation is of such a character as he ought not be believed on oath, and although untrue, is excusable in law if the publication was in good faith. In the administration of justice, where the witness is compelled to testify, and not responsible, even if his statements are untrue, unless guilty of perjury, he is not allowed, in bad faith, and with a knowledge that his answer is not relevant to the questions at issue, to defame or malign a party to the litigation, and when he does so the law ceases to protect him.

While the rule laid down by Mr. Townshend seems so broad as scarcely to admit of an exception where good faith prompts the disclosure, this same author, after establishing the rule, says that "the publication of defamatory matter is not privileged because made at a public meeting, unless pertinent to the matter in hand and when spoken in the exercise of duties required to be performed." Also, "a complaint to a church against one of its members by one who is not a member is not privileged; neither would such a complaint by a member against one who is not a member be privileged." §§ 234, 235 (2d ed.), Townshend on Slander. One who is not a member of a church making a complaint against one

who is might well maintain, as has been done in this case, that it was to the interest of the society to which the injured member belonged that his reputation as a man and Christian should be known, and that making the complaint in good faith, he is in law excusable.

The elementary books on the subject have not carried the doctrine so far as this, notwithstanding the broad rule established for the protection of those who deem it a duty to speak or publish defamatory matter of their neighbors and who when making the publication may have acted in good faith. In the present case the appellant and appellee were strangers to the lodge and the latter saw proper, when he was not involved in the trial of Redman, who was a member, to sign and swear to a writing that was not only injurious, if untrue, to the character of the appellant, but was signed for the purpose of being read in the lodge to show that appellant could not be believed on oath. If Nix, who was not a member of the lodge, had uttered or published defamatory matter of the member being tried according to the rule laid down in both Starkie and Townshend, he would have subjected himself to an action for damages.

The appellant's character was to be discussed upon the affidavit of the appellee at a meeting where the appellant could not, or at least had no right to be heard, and the result determined without an opportunity for defense, and doubtless adverse to the good standing of the appellant, as appellee's testimony, in the absence of conflicting proof, would doubtless have controlled the action of the lodge.

In the case of *Coombs v. Ware*, 8 Blackf. 589 it was held that "words spoken or written in the regular course of church discipline to or of members of the church are, as among the members themselves, privileged communications, and not actionable unless express malice appears; but an accusation made by a member of the church on such occasion against one not a member is not as to him a privileged communication." It is "obvious that to extend the rule so as to apply to strangers may sometimes cause irreparable injury to the character of innocent persons." It results therefore that the court below erred in permitting the amended answer to be filed, and in instructing the jury in substance that the facts therein stated "presented a defense to the action." See *Lucas v. Case*, 9 Bush, 297; *Furis v. Stark*, 9 Dana, 128; *Harper v. Harper*, 10 Bush, 447.

This ruling avoids the necessity of disposing of the other ques-

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tions made as to the incompetency of the testimony, as the interviews between appellee and the members of the lodge, or the committee in the absence of appellant were, in the views of counsel, necessary to make out the defense embodied in the amended answer.

Many witnesses were examined on both sides of the case and the counsel for appellant moved the court to confine the allowance of costs as against him to two witnesses on the side of the defense to any one point, and this was refused. The statute in regard to the taxation of costs directs the clerk "to tax the allowance to witnesses, which the court may by order confine to not exceeding two to any one point." The court must exercise its discretion in such a case and may allow the per diem to more than two witnesses to a point when proper to do so. We perceive no abuse of discretion on the part of the court in refusing to confine the allowance as asked by appellant's counsel.

The judgment below is reversed, with directions to sustain the objections to the filing of the amended answer and to award the appellant a new trial, and for further proceedings consistent with this opinion.

Judgment reversed.

SEIFRIED V. HAYS.

(81 Ky. 577.)

Nuisance — slaughter-house — common injury.

A slaughter-house near an inhabited locality is *prima facie* a nuisance.* One who sustains special injury from a nuisance is not debarred from an injunction by the fact that others suffer the like injury. (See note, p. 171.)

ACTION for injunction. The opinion states the case. The injunction was granted below.

James R. W. Smith and James Haran, for appellant.

Muir & Heyman, for appellees.

* *Conrad, Primer v. Pendleton* (75 Va. 516), 40 Am. Rep. 783.

reviewing the doctrine applicable to this class of nuisances, in commenting on the decisions in cases where the noxious trade had been established prior to the erection of the dwellings by the parties complaining of the nuisance, and in which the party was allowed to continue his trade because it was legal before the dwellings were constructed, said that those authorities did not affect cases involving the public rights and demands of cities and their populations, and cited the cases of *Commonwealth v. Upton*, 6 Gray, and *Brady v. Meeks*, 3 Barb. 157, where it was held in both cases that the carrying on of an offensive trade for years, when there were no adjoining buildings, did not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood.

The pursuit of a noxious trade, says this court, "is lawful so long as it does not interfere with the rights of the public, but when it does so interfere, it becomes illegal;" and while this applies to a prosecution by the State, the weight of authority leads to the conclusion that in the progress and growth of cities, where dwellings have been erected near slaughter-houses, and by reason of the poisonous atmosphere emanating from such establishments the dwellings are rendered unfit for comfortable habitation, the owners have their remedy against the party whose mode of business creates the nuisance. *Greenl. Ev.*, § 473; *Dana v. Valentine*, 5 Met. 8; *Howell v. McCoy*, 3 Rawle, 256.

This court in the case of the *Louisville Coffin Co. v. Warren*, relied on by counsel for the appellant, held, that where a nuisance caused substantial injury to the dwellings around it, or affected the health of the residents, the chancellor would interfere to abate it. That was an ordinary manufacturing establishment that could exist in the midst of a dense city population without affecting the inhabitants, save as they were annoyed by the noise of the machinery and the inconvenience arising from smoke, etc., that settled near the dwellings, and that was afterward prevented by the use of proper appliances; but here is a case where a party is charged with continuing a nuisance that must necessarily affect the health of the neighbors, or necessitate the abandonment of their homes, unless relief is given by the chancellor. The question presented is, shall the right of these appellees to the enjoyment and comfort of their homes and families be held subordinate to the right of the appellant to continue a nuisance because his slaughter-house was

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erected before they purchased their homes? This question has been answered by the judgment below, in the event the testimony sustains the complaint. There is an apparent conflict in some of the statements made by the witness, but nearly all concur in the fact that the atmosphere in the vicinity of this slaughter-house was poisoned by this noxious vapor during the spring and summer of 1881. There were other slaughter-houses and distilleries in the same locality, but the origin of this foul odor cannot be, or at least has not been traced to any of them with that unerring certainty that it has to the slaughter-house of the appellant. From that direction and no other seems to have come an odor that caused the closing of the doors and windows of the dwellings of these appellees during the evenings of the spring and summer of the year 1881, and in fact the doors and windows of the church near by had to be closed for the same reason; and such was the character of the stench, that it produced nausea, and if these appellees and their witnesses, twelve or fifteen in number, are to be believed, must have rendered their houses almost uninhabitable.

That the poisonous odor existed cannot be doubted, and the decided weight of the testimony is that it originated from the slaughter-house of the appellant. The boiling of the skins and bones of dead animals in the tank used by him in his establishment without using the proper disinfectants, must have caused the trouble complained of. The testimony is perfectly satisfactory that such was the case, and in this conclusion the court below has been sustained by several witnesses who have testified for the appellant. That a peculiar odor is attached necessarily to such an establishment must be conceded; but when kept cleanly, and the proper disinfectants used, there could not well be such a condition of things as could poison the atmosphere for several hundred feet distant from the building.

The chancellor has not undertaken to stop the business of the appellant, or to interfere in any other manner with the operations of his establishment than to prevent him from so using the slaughtered animals, or parts of them, as to create the offensive and poisonous odor of which appellees complain.

The judgment is therefore affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Corley v. Lancaster*, 81 Ky. 171, the court said: 'There may be nuisances public in that they produce injury to many

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persons or all the public, and private, because at the same time, they produce a special and particular injury to private rights, which subjects the wrongdoer to indictment by the public, and to damages at the suit of persons injured." Wood Nuis. 22.

"In such a case an individual may maintain an action, though the nuisance complained of be public in its nature, if he alleges and shows special injury to himself, notwithstanding it appears that other individuals have also suffered injury from the same cause.

It does appear in this case that other persons suffered injury from the alleged nuisance, but that is not a sufficient reason to deprive appellants of their right to maintain this action, if it be true that the water of the creek has been injured, and the air they breathe has been poisoned and corrupted by the act of appellees, whereby the enjoyment of their property has been rendered essentially uncomfortable and inconvenient.

See *Little Rock, etc., Ry. Co. v. Brooks*, 39 Ark. 408; *Francis v. Schoellkopf*, 58 N. Y. 153.

 STEPHENSON'S ADMINISTRATOR v. KING.

(21 Ky. 435.)

Gift — causa mortis — symbolical delivery.

The delivery to the donee of the key of the donor's desk in which she kept her papers, and of a descriptive list taken by her therefrom of notes and bonds in the hands of her agent, accompanied by words of gift, constitutes a good symbolical delivery, *causa mortis*, of such notes and bonds. (*See note, p. 178.*)

THE opinion states the case.

Anderson & Anderson and *A. P. Humphrey*, for appellant.

Jas. Harlan, A. C. Wilson and *Denny & Tomlinson*, for appellee.

PRYOR, J. The intestate, M. L. Stephenson, was twice married. Her first husband was C. C. Storms, by whom she had one child, John Storms. She obtained a divorce from Storms in the year 1873, the father retaining the custody of his child, and afterward married Stephenson, who is now dead.

Mrs. Stephenson died in July, 1881, and her husband, the appellant Storms, administered upon her estate, and this controversy is

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between him as administrator and the appellee, Mrs. Evans, the mother of Mrs. Stephenson, in reference to a mortgage note for \$5,500 and two Taylor county bonds. Mrs. Evans claims the note and bonds under a gift *causa mortis* from her daughter, alleged to have been made the day prior to her death, and the appellant Storms claims them to pay debts and then for his son John, the child of the intestate.

[Minor considerations omitted.]

The only question in this case is : Has the gift *causa mortis* been established ? The appellant's intestate, Mrs. Stephenson, when living in Louisville, selected the appellee, John King, as her agent, placed her money in his hands for investment and when she died King had the \$5,500 note and the Taylor county \$500 bonds in his possession, the bonds payable to bearer and the note indorsed in blank. The purpose on the part of Mrs. Stephenson to give this note and bonds to her mother is established by undoubted testimony. Mrs. Marrs, Eliza Carson and Dr. Young all establish this fact, and there is no reason for discrediting any statement made by either of these witnesses.

The principal witness establishing the gift is one Henson, a servant in the family, and if he is to be believed the defense is made out, and we think his testimony is strongly corroborated by those who are above suspicion. The gift was made to Mrs. Evans, the day before her daughter died, by an actual delivery of the only evidence she had of King's having possession of the notes and bonds.

They were in the possession of King at Louisville and no actual delivery of these evidences of debt could have been made. It seems she had written to King to know the condition of her accounts and he responds on the 13th of April, 1880, in which he says : "I now have in my safe one promissory note belonging to you on W. P. Hahn and Mattie Hahn, dated February 11, 1878, payable five years after date, for \$5,500, with interest from maturity at eight per cent per annum," and also recites the \$500 Taylor county bonds, etc. This letter is signed by King, and said to be genuine by him when examined as a witness.

Henson, the principal witness, says he was living at Mrs. Stephenson's when she died. She told her mother that she gave her property to her ; "told her about a week before she died she gave her every thing ; gave her the key at the time and told her that every thing that was there was hers ; the day before she died she requested

her mother to bring her her writing desk. She brought the writing desk up to her bedside, she opened the drawer and gets out a paper and gave it to her mother, and told her mother that this paper was to show the property she had at Louisville and to get her money on the paper. Her mother took the paper and put it in her pocket. It was fine note paper, written on both sides. She took the keys. It was the key of the desk Mrs. Stephenson handed her mother. Her mother unlocked the desk and pulled the drawer open and Mrs. Stephenson got the paper. This paper is identified by the witness as the letter from King, in which a statement is made of the property in his possession belonging to Mrs Stephenson. Dr. Young, the physician of Mrs. Stephenson, a man of intelligence in and out of his profession, says that on the morning of the day of her death he said something to her about the disposition of her property. She said: "I want my mother to have it all, after my debts are paid. I want my mother to have every thing I have." And when told she was going to die she said "it is all for my mother." Dr. Young says that after she made the remarks to him about her estate Mrs. Marrs came into the room, and he told Mrs. Stephenson that he wanted her to tell Mrs. Marrs about the disposition of her property. She said; "Doctor, that is all fixed; it is all my mother's," and repeated it several times. Mrs. Marrs testified to the same fact, and there is no escape from the conclusion that the gift was made, if there was such a delivery as the law requires to constitute a gift *causa mortis*.

There is nothing in Dr. Young's testimony but what conduces to corroborate that of Henson, that the intestate stated to the doctor, "I want mother to have it all — it is all for mother," is not inconsistent with Henson's statement, for it is evident that the intestate knew the estate would pass to her, even could she make some other disposition of it, and when the statement made to the doctor is considered, in connection with that made by the intestate to Mrs. Marrs, at the doctor's instance, it is a complete corroboration of the witness Henson. She responded to Mrs. Marrs by saying, "Doctor, that is all fixed — all mother's." She must have alluded to the gift made in the presence of Henson — that is, the delivery to her mother of the key of the small desk, and the actual delivery of the letter from King, which was in fact, a receipt evidencing the existence of the claims in controversy then in King's possession.

It is evident that there must have been either an actual, constructive or symbolical delivery of the notes in controversy to make it a gift *causa mortis*. It is insisted by counsel for the appellant that in order to make such a gift of a note or bond, it must be delivered by passing manually from the possession of one to the other, and from this view of the question it follows that no delivery of the subject of the gift can be made when the donor of the gift is out of possession, or when he is unable by reason of its being in the possession of his agent, to obtain the possession at the moment the gift is made. If this be the correct rule, no gift *causa mortis* can be made of the thing, because it is not in the actual possession of the donor. Cases have been cited sustaining the position assumed by counsel. *Sprattly v. Wilson*, note 1st, Williams Ex'rs; *Case v. Dennison*, 9 R. I. 88; *Stevens v. Stevens*, 2 Hun, 470. This rule we think has been greatly modified by the more modern decisions on the subject. It is that the delivery must be according to the nature of the thing, and usually that means according to the physical nature of the thing to be delivered, such as the bulk or weight, and does not refer to the locality of the thing. Under the ancient doctrine, if the thing given was a chose in action, the law required an assignment, or something equivalent in the form of a writing, and the transfer must be actually executed. This is the rule laid down by Kent in his Commentaries, vol. 2. Now will it be insisted under the more modern authorities, that an actual delivery of the chose in action to the donee will not constitute a gift? We think not. And when the donor delivered that which is the evidence of his right to property in the possession of his agent, or his attorney, and when actual delivery of the thing itself is impossible at the time by reason of the possession being in another, we see no reason why there may not be such a delivery of the evidence of the right to the thing as is required to constitute a valid gift *causa mortis*. The possession of the agent is the possession of his principal. King was in Louisville with the notes and bonds in his possession, investing them as the bailee or agent of the intestate. She delivered to her mother the receipt of King, or the letter she held, which is in effect a receipt saying that it is a gift to her, and she must go and get the money. The delivery of a bill of lading, or a warehouse receipt would have passed the right; but it is argued in such a case that the writing is the representative of the thing itself — a symbolic delivery of the title and possession — while a note, or the delivery of

it, cannot pass in such a way. If the delivery of a debt or chose in action consists in the assignment with notice, as decided in a case from 2 N. H., referred to by counsel, his position is well taken; but such is not the law, nor do we perceive any reason for recognizing such a rule.

In the case of *Stevens v. Stevens*, 2 Hun, 470, the dying wife said to her husband, "You may have all the money." It appears that the money she owned was represented by two notes, one of which was in the bureau in her husband's house, and therefore was accessible to him, and the other pledged to some one as collateral security; it was held that as to the note in the husband's house, which was in effect already in the donee's possession, the gift was good, but as to the note pledged as collateral security the gift was invalid. This is also a case relied on by appellant's counsel. Suppose there had been in the bureau the receipt of an attorney for the collection of this note, and the wife, with the power to dispose of it, had handed to the mother the receipt of the attorney, saying that she gave her the note, why would not that have passed all the right to the mother? Suppose she had given her an order for the note, would not the gift have been valid? and if so, why is not the delivery of the receipt or the written evidence of the donor's right to the note then in the possession of the attorney sufficient? A verbal statement that she gives the note is not sufficient, for there is nothing delivered representing or evidencing her right. In the case of *Simpson v. Thompson*, 2 Metc., this court held that the more modern doctrine was that the beneficial interest in a note passed by delivery. There it is true the note was actually delivered, but without an assignment, but it shows the modification of the former ruling on the subject. The older authorities maintained that a chose in action must pass by an assignment, and a delivery without it did not constitute a gift *causa mortis*, and that being the case, no receipt or other writing evidencing the right to the note could operate as a transfer of the beneficial interest or possession so as to constitute a valid gift. In passing the receipt evidencing the right of property and the possession with the agent, the donor parts with such dominion over the note as makes the gift valid. It is true the legal title is in the donor or her representative, and a payment by the agent or the debtor to the donor, or her representative without notice, would defeat a recovery by the donee, but such would be the case when there had been no assignment of the note, or a payment without notice of the transfer.

This court in *Ashbrook v. Ryan*, held that the delivery of the notes without assignment perfected the gift, and it is there further held that the delivery of the pass-book did not give the right to the money in bank. Why it did not is not stated, but if equivalent to a certificate of deposit, we see no reason why it should not have been a complete gift.

What evidence the pass book contains of the deposit in that case does not appear. If an ordinary pass-book, and it must be so inferred, it was an acknowledgment by the bank that the donor had to his credit in the bank that much money, and when actually delivered we cannot see why it did not pass the right. This court in the case of *Southerland v. Southerland*, 5 Bush, 591, recognized a valid gift *causa mortis*, when the husband a few days before he died, called to his bedside Houston, who held the note, and said to him "that he wanted his wife to have the note." After this Houston brought the note to the wife, saying that the intestate had given it to her. There neither was or could have been a delivery of the note at the time, as the record states, yet the court held it a valid gift, and that the party holding the note, Houston, was from that time holding it as a trustee for the wife. In the case of *Merriwether v. Morrison*, 78 Ky. 572, the intestate indorsed on the note: "I transfer this note as a gift to Miss Agnes Morrison." A few weeks before the testator died he called the donee to his bedside and told her he had given the notes to Dr. Merriwether for her. He told Dr. Merriwether to put them in the desk of the intestate, and after his death to give them to Miss Morrison. Witness did so — placed the notes in the desk in the room of the intestate, and handed the key back to intestate, and saw them no more until after his death. The gift was held to be valid. In *Ellis v. Secor*, 31 Mich.; s. c., 18 Am. Rep. 178, the facts are: on a slate by the bedside of the intestate, who was found dead, was in her handwriting, and signed: "I wish Dr. L. to take possession of all, both personal, real and mixed. I am so sick I believe I shall die; look in valise." In this valise was found a memoranda written by her, directing Dr. L. to take all of her property. The court said: We think it clear that Rachel Hill did all that she could to create a gift *causa mortis*, and fully intended it, and that her written declaration should prevail as a valid appointment to the uses indicated, as fully as if that had been a manual delivery of the securities." In *Hill v. Stephenson*, 63 Me. 364; s. c., 18 Am. R. 231.

M. had deposited money in bank, handed his pass-book to C., at the same time saying to him that he gave the money in that book to H. and I., and requested him to keep the book, and after his death to divide the money between them. It was held to be a valid gift of money to H. and I.

In *Elam v. Keen*, 4 Leigh, 358, Elisha Keen devised the whole of his estate to his mother, Elixabeth Keen, who was also his executrix. The devisee, Elizabeth, being entitled to a bond which had been executed to her testator, which bond was then in suit, told the plaintiff "that he might have the bond, and gave him the attorney's receipt for it." It was insisted that there was no such delivery as rendered the gift valid, and this was the only issue. The court said: "There are many things of which actual manual tradition can not be made, either from their nature or situation at the time. It is not the intention of the law to take from the owner the power of giving these. It merely requires that he shall do what, under the circumstances, will, in reason be equivalent to an actual delivery." The gift was held valid. In the present case the intention to make the gift, long before it was made, is established by undoubted testimony. The motive for making it is equally as well established, and the delivery of the key of the desk, and the actual delivery of the letter from King containing a full description of the note and bonds held by the agent, the only evidence the intestate had of his possession for her use, is a sufficient delivery to make the gift complete. No other delivery could have been made, and the arbitrary rule such as formerly existed with reference to the delivery of choses in action, requiring an assignment and delivery of the identical thing in order to make such a gift valid, having long since been abandoned, there is no reason why the intention to give, with the actual delivery of the written evidence of the right to the thing, although in the possession of another, under the belief of the donor that it perfects the gift, should not be held to constitute a valid gift *causa mortis*. The chancellor below acted properly in giving to the mother of Mrs. Stephenson the note and bonds in controversy, subject to the rights of creditors.

Judgment affirmed.

NOTE BY THE REPORTER.—See note, 48 Am. Rep. 787; 23 Eng. R. 637; 30 Alb. L. J. 854. In *Shoogog v. Perkins*, 4 Bart. 278, P., in feeble health, deposited a box of gold in a bank, directing the cashier to deliver it to no one but P. or P.'s wife. P. delivered the key to his wife, informing her of the

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deposit as made for her and that she could get it by personal application. *Held*, no gift. The court said. "It is manifest from these instructions that Constantine Perkins did not intend to relinquish his dominion over the box and its contents, but on the contrary, he specially asserted it by the terms of said instructions; and the restriction thus imposed upon his bailee, that in the event of his death it was to be delivered to his wife — the trusted depository of his valuables in these disordered times — is altogether consistent with the purpose, declared to the witness Roland, that this gold was deposited as his own, and for the payment of his debts.

In *Williams' Appeal*, Penn. Supreme Court, May 19, 1884, A., in contemplation of leaving home, purchased an accident insurance ticket, which by its terms was non-transferable under pain of forfeiture. Before leaving home he laid the ticket on a table in front of his wife, and said to her that "she should take it and take care of it, and that if he got killed before he got back she would be \$3,000 (the amount of the policy) better off." *Held*, that these facts were insufficient to establish a gift of the ticket to A's wife as against his creditors; that in order to establish such a gift it was necessary to prove that A. intended to part with both the possession and property of the ticket. *Linsanbigler v. Gourley* 56 Penn. St. 166; *Crawford's Appeal*, 61 Penn. St. 52.

In *Trough's Estate*, 25 P. F. Smith, 115, Trough effected a life insurance, being solvent. In consideration of \$1 and love and affection for his children he executed under seal an assignment of the policy to Hicks in trust for them; put the policy and assignment into an envelope, addressed "John W. Hicks, Plumber, 2d St., etc — Please send this to him at my death, H. Trough," and placed the envelope in in a safe of his own firm. He paid the premiums till his death, seven years after the assignment; but never communicated the transaction to Hicks, who knew nothing of it till after his death. *Held*, that the assignment was invalid for want of delivery and the proceeds belonged to Trough's estate.

In *Champney v. Blanchard*, 89 N. Y. 111, the defendant had in her possession certain money belonging to one Mary Champney. She delivered to her a paper stating that fact. Mary Champney on her death bed gave the paper to defendant, stating that she gave her the money. The court held the gift valid, although there was no delivery of the money. "Delivery of the subject-matter is no doubt essential to gifts either *inter vivos* or *mortis causa*; but the object of delivery is to give possession, and in this case possession was already complete in the donee."

In an article entitled, "Delivery not always essential to a Gift," by Guy C. H. Corliss, 81 A. L. J., 426, 444, the writer says "In conclusion, the case of *Armitage v. Muce*, 96 N. Y. 538, deserves some consideration. It is a 'border line' case, but it seems to the writer to have been correctly decided. The question involved was as to the validity of a gift from a husband to his wife. In such case it is always difficult to prove an actual delivery of the subject of the gift, because of the control usually exercised over the property of the wife by the husband. The property of either is always more or less in the possession of both; and it frequently happens that the thing which the husband has given to his wife remains practically just as much under his control as it was

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before. If therefore the rigid rule requiring actual delivery were not somewhat modified in its application to cases of gifts between husband and wife, such gifts could rarely, if ever, be so made as to be valid in law. In *Armitage v. Mace* it appeared that the husband owned a certain mare which the wife had often expressed a desire to own. On one occasion they had just returned from the depot with the mare, and while standing at the stable beside her, the wife repeated her request for the mare, to which the husband replied: 'Very well, you like her so much I will give her to you; she shall be your property.' He then called the man who was taking care of her, and told him of the gift, and informed him that thereafter the previous orders that he had given him about the use of the mare were changed, and that he was thereafter to deliver the mare to Mrs. Armitage as she wanted it. Previous to this Mrs. A. had never driven the mare alone, but had driven another horse, and Mr. A. had always driven the mare. After this he ceased to drive the mare, and used another horse, and Mrs. A. used the mare exclusively. After this Mr. always recognized his wife's ownership, and the mare was known as hers in her husband's family. The court said: 'She thus had all the possession a wife living with her husband could have. She controlled the mare, used her when she chose to do so; she was recognized as hers, and no one else used her without her consent. While these facts do not make a very clear case of gift, they were sufficient to carry the case to the jury and to authorize a finding by them that the mare was delivered to and possessed by her in pursuance and consummation of the gift. Subsequently to the gift the mare was kept in the husband's stable, cared for by a hostler paid by him, and he paid for her feed, shoeing and training, as Mrs. Armitage had no estate or income. These facts were proper for the consideration of the jury, but did not nullify or destroy the gift, or conclusively show that one valid in law had not been made.'"

In *Providence, etc., v. Tuft*, to appear in R. I. Rep. the court said: "In *Tillinghast v. Wheaton*, 8 R. I. 533, this court decided that the gift of a savings bank pass book was in effect a gift of the deposit evidenced by it. It is not contended that the case at bar is distinguishable from *Tillinghast v. Wheaton* except in the matter of delivery. There are cases which hold that a delivery is so essential to a gift that it cannot be dispensed with even when the donee is already in possession. *Shower v. Pilck*, 4 Exch. 473; *Cutting v. Gilman*, 41 N. H. 147; *French v. Raymond*, 30 Vt. 623. There are other cases however more numerous and in our opinion more authoritative, which hold that a delivery is not necessary when the intended donee is already in possession, but that in such a case the gift, if completed and unambiguous, may be effected by a simple oral declaration. *Tenbrook v. Brown*, 17 Ind. 410; *Wing v. Merchant*, 57 Me. 393; *Carradine v. Carradine*, 53 Miss. 286; *Southerland v. Southerland*, 5 Bush, 591; *Waring's Adm'r v. Edmonds*, 11 Md. 424; *Stevens v. Stevens*, 2 Hun, 470; *Penfield v. Thayer*, 2 E. D. Smith, 835. And see *Winter v. Winter*, 9 W. R. 747; 101 Eng. Com. Law, 997; *Roberts v. Roberts*, 15 W. R. 117. We decide on the authority of these latter cases that Mrs. Hayden is entitled to the money as a gift *inter vivos* from her son. Let the decree be accordingly."

TATE V. HAWKINS.

(81 Ky. 577.)

Vendor and purchaser — vendor's lien — statute of limitations.

As against a remote vendee, a vendor's lien upon land does not subsist after the statute of limitations has run against a note given for the purchase money, and the first vendee cannot extend the lien by payments upon the note.*

ACTION to enforce a vendor's lien. The opinion states the case. The defendant had judgment below.

N. McMercer and *Wm. Lindsay*, for appellant.

John Allen Murray and *Wm. Milner*, for appellee.

LEWIS, J. July 31, 1861, in consideration of a tract of land sold, but not conveyed to him until March 17, 1862, appellee, Hawkins, executed a promissory note to the vendor, Jennings, payable March 1, 1863, to secure the payment of which a lien was reserved in the deed.

March 15, 1864, Jennings' executor, in writing thereon, assigned the note without recourse to appellant, the residue then agreed to be due having, as appears from a memorandum written at that time upon the note, and signed by Hawkins, been paid off for him by appellant.

On the same day Hawkins sold and conveyed the same land to Basket, the deed therefor being acknowledged and lodged for record April 16, 1864.

Basket having paid the full consideration, took possession of the land, and held it until March 23, 1875, when he sold and conveyed it to appellee, Milner, who paid him therefor, and has held ever since.

This action was brought March 21, 1881, against appellees, Hawkins and Milner, to recover personal judgment for the amount of the note unpaid against the first named, and to enforce the lien retained in the deed from Jennings, and subject the land in the possession of the latter to the payment thereof.

* See *Bissell v. Nix* (80 Ala. 281), 81 Am. Rep. 88.

No defense was made by Hawkins, and personal judgment for the debt was rendered against him; but Milner resisted enforcement of the lien, and judgment was rendered dismissing the petition as to him.

We do not agree with counsel for appellee that the memorandum upon the note signed by Hawkins imports any thing more than an acknowledgment by him of the amount of the note then due. The assignment by Jennings' executor invested appellant with the legal title to the note, and the right to maintain an action thereon for the residue of the debt due, and the enforcement of the lien upon the land for its payment.

The principal ground relied on by appellee, Milner, as a defense to the action, is the statute of limitation.

It appears from indorsements on the note that several payments were made by Hawkins subsequent to the assignment to appellant, one of them being dated March 10, 1873, which was within fifteen years from the time the cause of action accrued, and another was dated March 16, 1878, which was after the lapse of that period. And counsel for appellant, relying upon the cases of *Hopkins v. Stout*, 6 Bush, 375, and *English v. Wathen*, 9 Bush, 387, contends that the partial payment, made within the required period, was *prima facie* an acknowledgment that the balance of the note then remained unpaid, and suspended the running of the statute prior to the date of that payment.

But before this rule can be applied in this case, if it applies at all, it should, if the fact is controverted in the pleadings, be proved that the partial payment was made at the time it purports to have been made, or at least within fifteen years from the time the note became due. *Frazer v. Frazer*, 13 Bush, 397.

As however it is not clear either that the issue of fact was properly made in the pleadings, or that it was proved the partial payment was made within the time required to avoid the statutory bar, we will proceed to the main and decisive question, whether according to the rule adopted in the cases referred to, the partial payment made by Hawkins has had the effect to suspend the running of the statute to the prejudice of Milner, the remote vendee.

In *Stout v. Hopkins*, the following language is used: "The philosophy of a peremptory bar by statutory proscription results from two considerations: first, from the prescribed lapse of time, nothing else appearing, the law presumes satisfaction or exoneration;

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and second, the danger of the loss of evidence of extinguishment prudently makes the presumption intraversable and conclusive. But the acknowledgment within the statutory time defeats the presumption up to that time, and breaks a link in the continuous running of the statute, and consequently the antecedent time is not counted in computing the bar, and that elision operates so as to elongate the statute to a corresponding extent, and to postpone the cause of action to the date of the acknowledgment, just as the statutory saving of any sort of obstruction would do. The party making the acknowledgment waives past time, and is estopped from pleading it, and therefore the bar is not complete until the required time shall afterward run without further obstruction or recognition of the cause of action. The presumption of exoneration commences after such recognition, and if there shall be subsequent satisfaction, the posterior time must be long enough to authorize the presumption of it *per se* and alone. In an action brought before the interlapse of the time required by the statute, satisfaction in the meantime will not be presumed as a deduction of law, and the debtor could not complain of an elongation resulting from his own act."

In the subsequent case of *English v. Wathen*, this rule was adhered to, it being held that an "admitted payment * * * within fifteen years before the institution of the suit, which was not qualified or restricted by the evidence in its legal import or effect, was *prima facie* evidence of an acknowledgment, as of the date that the residue of the debt, as appearing from the note, remained unpaid, and of continuing liability therefor, and consequently sufficient to suspend the operation of the statute between the accrual of the cause of action on the note and the date of the payment."

According to the doctrine thus announced, the statutory bar of fifteen years is not complete until the required time shall have run after the last partial payment, or "the last obstruction or recognition of the cause of action," and consequently appellant might have brought this action against Hawkins at any time within fifteen years from March 16, 1878, the date of the last payment, or more than fifty years after the note fell due. And if the rule be applied to his lien upon the land, he would have a longer period within which to enforce it than is allowed to persons having title, though laboring under disabilities to maintain an action for the recovery of the land itself.

In our opinion, analogy, as well as the reason and policy of our statutes, forbid the extension and application of the rule to the prejudice of the remote vendee, Milner. "A statute of limitation," says Justice STORY, "instead of being viewed in an unfavorable light as an unjust and discreditable defense, should have received such support from courts of justice as would have made it what it was intended to be, emphatically a statute of repose." *Roll v. Morrison*, 1 Pet. 360. And in the language of another judge: "This is not the epoch when that salutary protection which the legislature has wisely thrown around us as a safeguard against fraud and oppression, should be frittered away by judicial refinements and subtile exceptions that never entered into the contemplation of its enlightened framers, and it has for many years been a subject of avowed and sincere regret with the most distinguished judges and eminent jurists of the age that any constructive innovations were ever engrafted upon the acts of limitation." Justice DORSEY in *Green v. Johnson*, 8 Gill and Johns. 394.

Having in view the further repose and security of innocent purchasers of real estate against fraud and oppression, not only did the legislature, by the Revised Statutes, reduce the time within which an action may be maintained for its recovery from twenty to fifteen years, but it has provided that "when any real estate shall be hereafter conveyed, and the purchase-money, or any part thereof, shall remain unpaid at the time of the conveyance, the grantor shall not thereby have a lien for the same unless it be expressly stated in the deed what part of the consideration remains unpaid," and the same provision was engrafted in the general statutes.

The effect of this, as construed by this court, has been to so far change the law existing prior to the Revised Statutes that the vendor is held to waive his lien as to creditors and subsequent purchasers, unless he complies with the statute and expressly states in the deed what portion of the purchase-money remains unpaid. But the lien still exists, upon equitable principles, against the immediate vendee, who must know if the price is not paid, and against volunteers under him, who can occupy no better position than he does himself.

The language of the statute is peremptory that civil actions upon promissory notes shall be commenced within fifteen years after the cause of action first accrued, and not after. And it has been held by this court that when an action on the note given for the purchase-price cannot, on account of the statutory bar, be maintained,

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the lien, which is only a mere security, cannot be enforced, the court using this language: "The lien is only a peculiar sort of resulting trust, and the statute of limitation applies to an implied trust. Besides, had the trust been express and not within the statute, still it could not be enforced as a mere incident to the debt which is the principal, if the debt is paid or barred by time." *Williams v. Smith*, 4 Bush, 541.

By the terms of the statute the action of appellant on the note was barred fifteen years after the note matured, and he had then lost his right to maintain the action for the enforcement of the lien.

If appellee, Milner, is now to be deprived of the safeguard provided by law, and upon the face of which he purchased and paid for the land, it is to be done by an obstruction to the running of the statute and a recognition of the cause of action after it had by law ceased to exist, made by Hawkins without his consent or notice to him.

This court has, in the two cases referred to, held that Hawkins could by his own act elongate the statute and continue his liability upon the note beyond fifteen years from the time it fell due, but it was not, nor ought to be, determined that Milner should thereby suffer.

The lien is a charge upon the land which it is not the policy of the law, nor in accordance with the analogy of the law, should exist longer than the statutory existence of the note; and if reasons were necessary to justify this salutary and necessary principle they are afforded by the circumstances of this case. Appellant is shown to have known of the purchase by Basket and of the sale by him to Milner, and from his relation to Hawkins, being a brother-in-law, must have known that Hawkins was paid in full for the land, yet he continued to indulge him for more than fifteen years and until he became insolvent, and then attempted to subject the land to the payment of his debt. The consideration for this indulgence, whether friendship for Hawkins or his agreement to pay usurious interest, did not benefit Milner. In our opinion the statute should not be thus perverted in letter and spirit for the benefit of a creditor guilty of such *laches*.

The judgment must be affirmed.

Judgment affirmed.

Louisville, Cincinnati and Lexington Railroad Company v Sullivan.

LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD COMPANY
v. SULLIVAN.

(81 Ky. 624.)

Carrier — expulsion of passenger — negligence.

A helpless drunken passenger on a railway train refusing to pay fare, the conductor, knowing his condition, expelled him, not at a station, and in the snow, by reason whereof the passenger was severely frozen. *Held*, that the company was liable.*

ACTION for wrongful expulsion from a railway train. The opinion states the case. The plaintiff had judgment below.

Bullock & Beckham, for appellee.

LEWIS, J. This is an action by appellee to recover damages for personal injuries sustained on account of being unlawfully, wrongfully and by the gross negligence of the conductor of appellant's train of cars, ejected therefrom and exposed to freezing weather while in a helpless condition.

From the evidence it appears that appellant, on the day he was ejected from the train, which was the 25th of December, walked from Cropper's station, on the line of appellant's road, where he was staying temporarily, to Christiansburg, another station, where he obtained whisky and as the evidence satisfactorily shows, became so intoxicated as to stagger when walking, and was in that condition, when between three and four o'clock in the afternoon, he got on the train for the purpose of returning to the first named station distant two and one-half miles; that when the train had gone between one-half and three-fourths of a mile he was approached by the conductor in the baggage car where he had improperly gone, and requested to pay his fare which was twenty cents, and refusing or as he says being unable to do so, the train was stopped and he was compelled to leave the train. He states that when he stepped from the car he fell down upon the snow, which other witnesses testify was at the time eight or ten inches deep, and remained there until next morning, not remembering what occurred in the meantime.

* See *Ry. Co. v Valley* (32 Ohio St. 345), 30 Am. Rep. 601.

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There is some conflict in the testimony as to the precise place the train left him, and also whether he was at the time standing or lying, one of the witnesses, a brakeman, testifying that he was standing and said to him, "You can kill me if you like." But about one hour and a half afterward, near the time for the train going toward Christiansburgh to pass, and about two hundred and fifty yards toward Cropper's from the place where the conductor testifies he was put off the train, he was discovered by one of the witnesses lying across the track, helpless and nearly unconscious, with a quart bottle nearly full of whisky, who pulled him off the track, but being unable to remove him from the place left him.

By reason of his exposure for such length of time to the cold weather, the temperature of which was, as stated by several witnesses, between eight and ten degrees below zero, his feet, hands, shoulder and parts of his legs and of one arm were frozen, causing intense suffering and confinement for several months, and the necessary amputation of his toes, several of his fingers and part of his heel.

Judgment having been rendered in accordance with the verdict of the jury for \$5,000, the railroad company has appealed and assign various errors.

[Omitting minor considerations.]

The second assignment is that the court erred in refusing to render a judgment for the defendant upon the special verdict of the jury.

As this, as well as the third assignment which refers to the action of the court in giving and refusing instructions to the jury, involves the question of appellee's right to maintain the action at all, we will consider them together.

Instruction No. 1, given at the instance of appellee, is as follows: "Although the jury may believe from the evidence that plaintiff got on defendant's cars to go from Christiansburg to Cropper's station, and that he had no ticket—and when his fare was demanded he said he had no money, and neither paid his fare nor delivered to the conductor a ticket—yet if they further believe from the evidence that he was then in such a state of intoxication as to render him mentally or physically incapable of taking care of himself, and he was then in such a helpless condition that to put him off said train would necessarily expose him to death, or great danger of being frozen, and that defendant's agents in charge of said

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train at the time knew plaintiff's helpless condition and the danger he would be exposed to, being then and there ejected from said train, then they should find for plaintiff such compensatory damages as he may have sustained thereby, as were the necessary and proximate results of his having been put off the train, not exceeding \$25,000."

Two instructions were asked by appellant, but as one of them was given so modified as to harmonize with the one given at the instance of appellee, and the one refused is the reverse of it, we need not quote them.

The following facts were found by special verdicts of the jury:

1. That though requested, appellant while on the train, refused to either pay his fare or deliver to the conductor his ticket.
2. He was at the time intoxicated, and in such a helpless condition as to be incapable of taking care of himself, and the conductor knew it when he put him off.
3. The conductor in ejecting him from the train used no more force than was necessary for that purpose.

From the facts found by the jury and the evidence in the case it is clear that even slight diligence and care on the part of the conductor would have enabled him to prevent the injury done to appellant.

It is clear also that the act of the conductor was within the scope and in the course of his general authority, and hence appellant must be held responsible for whatever liability attaches thereto.

It being thus established that at the time appellee was put off the train he was himself a trespasser and that the calamity which befell him was brought on, in part at least, by his own conduct in getting drunk, the question that arises is whether the act of the conductor is to be held in law, as it is in fact, gross negligence for which appellant may be liable.

The right generally of railroad companies to put off their trains persons who refuse to pay their fare when requested by the conductor may be conceded; but does it follow that this right may be exercised in such a manner, under such circumstances, or against a person in such mental or physical condition as that death or serious bodily harm will necessarily, or even probably, result from putting him off?

It is true that appellee, by refusing to pay his fare, became technically a trespasser; but it is well settled that a party may in some cases recover for the gross negligence of another, notwithstanding

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he may have been a trespasser upon the rights of the other at the time he received the injury.

"Negligence or misconduct on the part of the plaintiff does not prevent him from recovering damages in those cases where his negligence or misconduct has not been the immediate co-operating cause of the injury he complains of." 1 Add. on Torts, 495. The rule by which to determine the right of recovery in such cases is that when the negligence of the defendant is the proximate cause of the injury, but that of the plaintiff is remote, consisting of some act or omission not occurring at the time of the injury, the action can be maintained, although the plaintiff is not without fault himself. *Kerwhaker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172; *Isbel v. N. Y., etc., R. Co.*, 27 Conn 393. And by this court it has been repeatedly held that although the plaintiff suing for an injury resulting from gross negligence may have himself been guilty of negligence, nevertheless, if the injury might have been avoided by the proper care of the defendant, such co-operating negligence of the plaintiff will not exonerate the defendant.

In the able opinion delivered in a leading case, *Isbel v. New York etc., R. Co.*, just cited, the court said: "A remote fault in one party does not of course dispense with care in the other. It may even make it more necessary and important if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are, to a greater or less extent, incident to human affairs. Preventive remedies must therefore always be proportioned to the case, in its peculiar circumstances, to the imminency of the danger, the evil to be avoided and the means at hand to avoid it. And herein is no novel or strange doctrine of the law. It is as old as the moral law itself, and is laid down in the earliest books on jurisprudence. A boy enters a yard to find his ball or arrow, or to look at a flower in the garden; he is bitten and lacerated by a vicious bull-dog, still he is a trespasser, and if he had kept away would have received no hurt; nevertheless is not the owner of the dog liable? A person is hunting in the woods or crossing a pasture of his neighbor, and is wounded by a concealed gun. Is he in such case remediless because he is there without consent? Or an intoxicated man is lying in the travelled part of a highway, helpless if not unconscious;

must I not use care to avoid him? May I say that he has no right to incumber the highway, and therefore carelessly continue my progress, regardless of consequences? Or if such man has taken refuge in a field of grass, or hedge of bushes, may the owner of the field, knowing the fact, continue to mow on or fell trees as if it were not so? Or if the intoxicated man has entered the private lane or byway, and will be run over if the owner does not stop his team, which is passing through it, must he not stop them? It must be so, that an unnecessary injury, negligently inflicted in these and kindred cases is wrong, and therefore unlawful. If assailed a man may do what is necessary to defend himself against the assault, but he may not become himself the assailant. He may defend his property, but he may not in doing it make use of unnecessary violence, and cease to use all care as to the injury he inflicts. The duties which men owe to each other in society are mutual and reciprocal, and faulty conduct on the part of another never absolves one from their obligations, though such conduct may materially affect the application of the rule by which this duty is to be determined in the particular instance."

The principles laid down and the illustrations given in the opinion just quoted from, are correct and applicable to this case.

In the case of *Johnson v. C., R. I. & P. R. Co.*, 58 Iowa, 348, the plaintiff was removed from the waiting-room of a railroad station by the agent of the defendant. His shoulder was dislocated either from a fall from the door out of which the agent pushed him, or by a fall after he landed on the platform. The plaintiff was not in the waiting-room awaiting the outgoing train to take passage, or for any other purpose for which a waiting-room at a station is kept open to the public. He had no right to remain there after being requested by the agent to leave it. He refused the request to leave before any violence was used toward him, and was drunk and disorderly. In the opinion delivered in that case the court said: "The rule that carriers of passengers are liable for the neglect, or wrongful acts of their servants or employees, does not always depend upon the fact that the carrier owes a duty, or is under some obligations to the party injured. When a person is found upon a train who refuses to pay his fare, the company owes him no duty, and he may be removed; but if in removing him he is wrongfully injured by personal violence, or by being thrown from the train when in motion, or the like, he may recover from the company for

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his injuries. This is no more than the application of the ancient rule that if one person comes into the dwelling house of another without right, after requesting him to depart, and his refusal to comply with the request, he may be removed by gently laying hands upon him and using such force as is reasonably necessary to effect the object; but if excessive force be used, the action is a wrongful assault."

The case of *Kline v. C. P. R. Co.*, 37 Cal. 400, was where a boy got upon a moving train as it passed his residence, with intent to enjoy a free ride for a short distance. The conductor, either by threatening or pushing, caused him to fall from the train while in motion, and a car-wheel to run over his leg, crushing it so as to necessitate amputation. The court held that "the conductor doubtless had the right to eject him by force, if force was necessary, but he was bound to exercise the right with ordinary care and prudence, and he had no right to eject him under circumstances which would endanger his personal safety. If the train was going at a speed which would render it unsafe for him to leave the car it was the duty of the conductor, if determined to put him off, to stop or slow up sufficiently to allow him to descend in safety by the exercise of reasonable care and prudence on his part. Although his entry upon the car was a trespass, yet if it was an accomplished fact before the conductor attempted to interfere, his entry did not directly conduce to the injury which he sustained, but was in the sense of the rule under consideration only its remote cause, and did not therefore absolve the conductor from the duty of observing reasonable care and prudence in putting him off the train."

In the case of *Weymire v. Wolfe*, 52 Iowa, 533, the plaintiff's intestate, Dunn, was an habitual frequenter of the saloon kept by the defendant, who sold him intoxicating liquor, which caused him to be drunk, and while he was in a state of helpless intoxication the defendant expelled him from his saloon at a late hour of the night, and Dunn being then intoxicated, died of cold and exposure. The court held: "If it should be conceded that Dunn contributed to his death by drinking until he became drunk and unconscious, it would not follow that the plaintiff would not be entitled to recover. If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him if it can be avoided in the exercise of reasonable care. If after the company should be guilty of negligence whereby the ex-

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posed person should be injured, the negligence of the company would be deemed the proximate cause of the injury. So if the defendant negligently subjected Dunn to exposure to his injury, knowing that he was unconscious or even helpless, the defendant cannot escape liability on account of Dunn's negligence prior to the wrongful acts whereby Dunn was subjected to exposure, however great Dunn's negligence may have been in allowing himself to become intoxicated."

That case is so nearly like this that the reasoning which may be applied to one is applicable to the other and if correct, as we believe it is, it must be regarded decisive of the question involved here.

If in defense of either person or property a party uses more force than is necessary, the defense degenerates into aggression, and the party becomes a wrong-doer and liable for the unnecessary injury inflicted, whether done intentionally or negligently. The language of the law is *molliter manus imposit.*

We do not understand this injunction as applying merely to the character of weapons that may be used in defense of the person, or the degree of propelling force applied in removing a trespasser from a party's premises; but it is intended to apply and govern as to the manner, and circumstances in which, and condition of the parties, when the right to protect one's person and property may be exercised. Thus force might be applied legally to a strong, vigorous man, when the danger to the person was imminent, or the value of property or rights threatened or invaded great, which would become wanton cruelty or gross negligence in the case of a child, imbecile, or helpless drunken man.

In this case, if the evidence and the special findings of the jury are to be believed, appellant's agent and employee, if he did not use more actual force than was necessary to expel appellee from the train, did use it under circumstances and at a time when the consequences ordinarily would be as injurious as when, in attempt to remove a trespasser from his dwelling-house, the owner should shove him from an upper story, or lead him into a pitfall or well, or when a person is pushed off a fast-moving train. In every such case the party would be justly chargeable with negligence, and held liable therefor, the fault or negligence of the person injured being remote, and therefore affording no defense to an action brought for the injury resulting.

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Applying these principles, which are in accordance with the authorities, and sustained by the necessities of society and the analogies of the law, the instruction of the court, which we have quoted, was right, and it was not error to overrule the motion to render judgment for the appellant upon the findings of the jury. The judgment is affirmed.

Judgment affirmed.

BRANSOM'S ADMINISTRATOR V. LABROT.

(81 Ky. 628.)

Negligence — dangerous premises — infant trespasser.

The defendant piled lumber, in a large city, on an unfenced lot which the public were accustomed to cross and children to play upon, in a negligent manner, so that it fell upon and killed a young infant who was playing on the lot near it. *Held*, that a recovery was justifiable.*

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The defendant had judgment below.

John L. Scott, for appellant.

W. Lindsay, for appellee.

LEWIS, J. This is an action by appellant, Bud Bransom, administrator of his infant son, Bertie Bransom, deceased, brought under § 3, chap. 57, general statutes, which is as follows:

"If the life of any person * * * is lost or destroyed by the willful neglect of another person or persons, * * * their agents or servants, * * * then the widow, heir, or personal representatives of the deceased, shall have the right to sue such person or persons, * * * and recover punitive damages for the loss or destruction of the life aforesaid."

The question on this appeal is, whether the facts stated in the petition and amended petition, to which a general demurrer was sustained, constitute a cause of action.

* See *Gillespie v. McCowen* (100 Penn. St. 144), 45 Am. Rep. 365 and note, 40 Am. Rep. 667.

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The statement in the pleadings is substantially as follows: Appellees, Labrot & Graham, are partners in business, and as such the owners of about 200 pieces of oak and poplar timber, each eight feet long, from six to eight inches square, and weighing from 100 to 200 pounds, which they employed and caused appellee, Shaefer, their agent and servant, to pile upon a certain uninclosed and unprotected lot of land owned by Harvie, in the city of Frankfort; that instead of stacking the timber upon level ground, and placing the pieces so as to make the entire pile safe and secure, as they should, and by ordinary care and diligence could have done, they were by the gross and willful neglect of appellees placed promiscuously in one large, irregular and dangerous pile, six or seven feet high, on a small, cone-shaped hillock, so narrow that it was impossible for the pieces nearest the ground to safely support those above them, and the top pieces being thus left without secure foundation, leaned at irregular angles, and were suspended in a dangerous condition, ready to fall at any time of their own weight, that for a period of more than fifteen years next before the life of deceased was destroyed, the public had been licensed and permitted by the owner to enter upon, use, and enjoy at will, the lot and a passway across it, from Clinton to Wilkinson street, as a common thoroughfare, upon which passway, and not exceeding forty feet from Wilkinson street, the pile of lumber was placed, causing an obstruction thereto.

It is further stated that deceased was, when he was killed, residing with his father, within less than 200 feet of the lot, and for many years a large number of small children, living near thereto, were in the habit of resorting to and playing and amusing themselves, both day and night, on the lot, and around and near the timber after it was placed there, all of which was well known to appellees before and at the time. And after it was so placed, a person residing near the lot gave notice to them of the dangerous character of the lumber pile, and requested them to make it safe, which with ordinary diligence they could have done; but they failed and refused to do so, and permitted it to remain in the same condition until May 12, 1881, when without the fault of appellant or power to prevent it, or fault on the part of deceased, one of the heavy timbers fell upon his head and body, and crushed his brains out, instantly destroying his life.

To maintain an action under the section quoted, it is neces-

sary to allege that the loss or destruction of life was caused by the willful neglect of the party sued. But we do not agree with counsel for appellee, that because the term "gross," which signifies a less degree of negligence, is unnecessarily coupled throughout the petition and amended petition with "willful," which signifies the degree contemplated in the section, the force of meaning of the latter is qualified or rendered doubtful.

It does not appear whether Labrot & Graham were in the lawful possession of the lot or not, but as it may from the statements in the pleadings be fairly inferred, we will consider this case as if they were.

As a general rule the owner of land may retain to himself the sole and exclusive use and occupation of it, but as property in lands depends upon municipal law for its recognition and protection, the individual use and enjoyment of it are subject to conditions and restraints imposed for the public good, and from a reasonable and humane regard for the welfare and rights of others. Hence, according to the maxim, *sic utere tuo ut alienum non lædas*, a party may be made liable for the negligent use of his property, whereby the person or property of another has been injured.

It is held that a party is guilty of negligence in leaving any thing in a place when he knows it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third person. 1 Add. Torts, 511. And said a learned judge "It appears to us that a man who leaves in a public place along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion." 39 B. Din. 339.

Counsel for appellees refers us to the following rule laid down in the case of *Hargraves v. Deacon*, 25 Mich. 1: "The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees or others who may come upon them, not by invitation, express or implied, but for pleasure or to gratify their curiosity, however innocent or laudable their purpose may be.

If this rule is to be interpreted so as to relieve the owner of pri-

vate grounds from all or even reasonable care for the safety of those who, without his invitation, may come upon them, it is not a reasonable or humane rule, for the owner has no right to wantonly injure even an actual trespasser. It however has no application to this case, for the lot upon which the lumber pile was placed had been for many years, by license of the owner, used as a passway by the public and a play-ground by children, and even if appellees were lawfully in possession of the entire lot, still the transfer of that possession by the owner to him did not necessarily operate as a revocation of the license, or make those going on it, without notice of such revocation, even technical trespassers, especially as the lot continued uninclosed.

But the rights and duties of appellees in this case are to be considered and determined in their relation to an infant, who though his exact age is not given, is stated in the pleadings to have had, by reason of his tender years, no knowledge of the impending danger from the timber pile, or power to prevent the destruction thereby of his life.

It is a reasonable and necessary rule that a higher degree of care should be exercised toward a child incapable of using discretion commensurate with the perils of his situation than one of mature age and capacity, hence conduct which toward the general public might be up to the standard of due care may be gross or willful negligence when considered in reference to children of tender age and immature experience.

While therefore the owner of land is not bound to provide against remote and improbable injuries to children trespassing thereon, there is a class of cases which hold owners liable for injuries to children, although trespassing at the time, when from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such an injury to flow therefrom as actually happened. In such case the question of negligence is for the jury. 1 Thomp. Neg., 304-5, and numerous authorities cited

"It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instinct, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted

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to it and tempted to intermeddle by instincts equally as strong, might thereby be killed or maimed for life. Such is not the law." 9 East, 277.

The proprietor of a paper mill propelled by steam, in a sparsely settled portion of a city, left two cog-wheels geared together outside the wall, twenty inches from the ground and twenty feet from the street, exposed, unprotected and constantly in motion. A boy three years of age, playing near this gearing, was caught in it and his leg taken off. In that case suit was brought after the party injured arrived at full age, and the jury found for the defendant; but the Supreme Court reversed the judgment on the ground that the verdict was against the evidence. 1 Head, 610.

The owner of a coal yard had an elevator worked by steam close to the sidewalk. During an intermission of work the sliding door, by which it was commonly shut off from the street, was left open and unguarded, in consequence of which a child got under it and was crushed by the descending car. The question in that case was held to be for the jury. *Mullaney v. Spence*, 15 Abb. Pr. N. S. 319.

In the case of *Railroad Co. v. Stout*, 17 Wall. 657, it was held that the care and caution required of a child is, according to its maturity and capacity, only to be determined in each case by the circumstances of that case, and that a railroad company might be held liable on the ground of negligence for a personal injury to a child of tender years in a town or city, caused by a turn table, built by the company on its uninclosed land, left unguarded and unlocked, in a situation which rendered it likely to cause injury to children. To the same effect are the cases of *Keffee v. Milwaukee R. Co.*, 21 Min. 207; s. c., 18 Am. Rep. 393; *Koons v. St. Louis R. Co.*, 65 Mo. 592; and *Whirley v. Whitman*, 1 Head, 610.

The case of *Louisville & Portland Canal Co. v. Murphy*, 9 Bush, 522, is not inconsistent with the general doctrine now made applicable to this case. There a small child, attempting to follow her sister, only two years older than herself, who had been sent to a grocery store on the opposite side of the canal from where they lived, fell through the iron railing of the bridge and was drowned. The bridge was safe and sound for all ordinary purposes of travel, and was originally built as a matter of private convenience to the company. It was not a proper or usual place of resort for children, because it was more or less dangerous to them, whether sound or not; nor did

the defect in the railing render it unsafe for persons to pass over it. This court therefore held that "good faith did not require it should be kept in such condition as to make it a place of safety for children, and when made to answer all the purposes of travel, nothing more should be demanded of the company."

In this case the lumber pile was within forty feet of a public street, across a passway the public had been accustomed to use, and upon an open, unfenced lot that children had for years been in the habit of resorting to by license of the owner, and without objection or warning by appellees, and to which they could, before the timber was placed there, resort with safety. It was therefore the duty of appellees in placing their timber upon the lot, to do it in such manner as to make it reasonably safe and secure against injury to children coming there; and as according to the statement in the pleadings, they failed to do so, and the lumber was piled by appellee, Shaefer, as the agent and in the scope of his authority from appellees, Labrot & Graham, we think a *prima facie* case was presented, and the court erred in sustaining the demurrer.

Wherefore the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

HANSON V. JOHNSON.

(28 Md. 25)

Adverse possession — of husband under wife's irregular will — tacking

A wife devised a farm to her husband for his life, with remainder in fee to her nephew. The will was admitted to probate, but was not executed in compliance with the statutory requirements. The husband entered into possession under claim of title, and continued in possession for thirteen years, and then joined the nephew in a sale of the farm, and the purchaser entered and held possession for fourteen years. Then in ejectment by the heirs-at-law of the testatrix against the purchaser, *held*, that the husband's possession was adverse and exclusive, and the purchaser's possession was tacked thereto, and both constituted an effectual adverse possession.

EJECTMENT. The opinion states the case. The defendant had judgment below.

D. Hopper Emory and Wm. A. Hammond, for appellants.

James A. Pearce, for appellee.

ROBINSON, J. This is an action of ejectment, brought by the appellants, as heirs-at-law of Catharine H. Wroth, to recover an undivided half interest in a tract of land, of which she died seised.

The facts are these: Mrs. Wroth died in December, 1854, leaving a paper purporting to be a will, by which she devised the farm in controversy to her husband, Peregrine Wroth, for life, with remainder in fee to her nephew, George A. Hanson.

The will was not executed in due form to pass real estate, as required by the act of 1842, chapter 293, then in force, because the consent of her husband, in writing, was not annexed thereto, and also because it was not executed sixty days before her death. It was admitted however to probate by the Orphans' Court of Kent county, and under it her husband on the 1st of January, 1855, entered into possession of the property, claiming title as tenant for life, and so continued in possession until the 5th of February, 1868, when he united with the remainderman, George A. Hanson, in a sale and conveyance of the same to the appellee, and who thereupon entered upon said property and has continued in possession up to the institution of this suit.

Mrs. Wroth never had any children, and the appellants, as heirs-at-law, are entitled to recover, unless their right is barred by the adverse possession of the appellee and of those under whom he claims.

A great deal has been said as to what constitutes adverse possession, and it would be a wearisome task to examine at length the many cases in which this question has been considered. Prior to the statute of 3 and 4 Will. IV., chap. 27, it was an ever-recurring and troublesome question in England, but by that statute, passed in 1833, the doctrine of adverse possession was virtually abolished, and by it possession of any kind for twenty years was made a bar, unless there was either a payment of rent or an acknowledgment of some kind by the party in possession. The effect of the statute, says Lord DENMAN, in *Culley v. Doe*, 3 Per. and Dav. 539, is to put an end to all questions and discussions whether the possession of lands be adverse or not; and if one party has been in possession for twenty years, whether adversely or not, the claimant whose original right of entry occurred above twenty years before bringing the ejectment is barred. *Nepean v. Doe*, 2 M. & W. 911; *Doe v. Jauncey*, 8 C. & P. 99.

This statute is not however in force in this State, and the question of possession in this case is one to be determined by Stat. 21, Jas. I, chap. 16, which provides that no one shall make an entry into any land but within twenty years after his right shall accrue.

Now when the question arose whether one was barred by twenty years' possession, it was determined by considering whether he had been out of possession under such circumstances as had reduced his interest to a right of entry; for if he had, then as that right of entry would be barred by the statute at the end of twenty years, the possession during the intermediate time was adverse to him. And in order to determine whether he had been out of possession under such circumstances as reduced his estate to a right of entry, it was necessary to inquire in what manner the person who had been in possession during the time held. If he held in a character inconsistent with and hostile to the title of the claimant to the freehold, the possession was adverse. 2 Smith Lead. Cas. 531; *Nepean v. Doe*, 2 M. & W. 910; *Talyor v. Horde*, 1 Burr. 60.

"Twenty years' adverse possession," says Lord MANSFIELD, in *Taylor v. Horde*, "is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession."

The question then of adversary possession in this case resolves itself into this, was the possession of Doctor Wroth, under whom the appellee claims, inconsistent with and hostile to the title of the appellants as heirs-at-law? And in regard to this question there ought not, it seems to us, to be any doubt. During the life-time of his wife he received, it is admitted, the rents and profits of the farm in controversy. To these he was entitled by virtue of his marital rights. Upon her death, this right ceased. He was not tenant by the curtesy, because his wife never had any children. He was not a tenant by sufferance, because an estate at sufferance is where one comes into possession by lawful title, but keeps it afterward without any title at all. Or, as Lord COKE says, "one who originally comes in by right but continues by wrong." It is a tenancy founded originally on contract and agreement, as a lessee for years, who continues in possession after the expiration of his term, and without a renewal of the lease, or a tenant at will, who holds over after the death or alienation of the lessor, or a tenant *per autre vie*, who remains in possession after the death of the *cestui que vie*. Coke on Little. 57b.

After the death of his wife Doctor Wroth took possession, claiming a life estate under her will. His claim of title was inconsistent with and hostile to the title of the appellants as heirs-at-law. The property was a farm, under inclosure and under cultivation; his

possession was actual, visible, and according to all the authorities, adverse to the title of the lawful owner.

But then it is argued, to constitute adverse possession, one must claim the entire estate or claim to the exclusion of all other rights. In one sense this is true. Possession will not be adverse if it be held under or subservient to a higher title, nor if it be consistent with the interest or estate of the claimant, for instance, where the possession of one is the possession of the other, or where the estate of one in possession and that of the claimant form different parts of one and the same estate. The mere entry and possession of one tenant in common, or joint tenant, or coparcener, will not be adverse to the co-tenant, because the possession of one is the possession the other. To constitute adverse possession in such cases, there must be an ouster, an entry and possession, hostile to the title of the co-tenant. Nor will the possession of a tenant for years or tenant for life, be adverse to the reversioner or heir in remainder.

The decisions in *Smith v. Burtis*, 9 Johns. 180; *Howard v. Howard*, 17 Barb. 667; *Doe v. Pettett*, 5 Barn. & Ald. 223; *Dean v. Brown*, 23 Md. 16; *Bedell v. Shaw*, 59 N. Y. 46, were decided upon these well-settled principles.

In this case however Doctor Wroth entered into possession claiming a life estate under the will, the remainder being devised to another person. The estate claimed by him was a freehold, and as there could only be one possession or seisin of the same estate at the same time, his possession inured to the benefit of the remainderman. His possession was in law the possession of the remainderman, and as such it represented the entire estate, his own estate for life, and the estate of George A. Hanson in remainder. And his claim of title and possession being hostile to the title of the appellants as heirs-at-law, his possession was as against them adverse and exclusive. The will was it is true, invalid, but Doctor Wroth having entered into possession claiming title under it, he would be estopped from denying the title of the remainderman claiming under the same instrument. This was decided in *Board v. Board*, L. R., 9 Q. B. 48; s. c., 7 Eng. R. 111. In that case a tenant by the curtesy undertook to devise the curtesy estate to his daughter for life, with remainder to his grandson. Upon the death of the testator the daughter entered into possession, and having been in possession for twenty years, sold and conveyed the property in fee to the defendant. In the meantime the grandson sold his rever-

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sionary right to the plaintiff, and upon the death of the daughter, he brought an action of ejectment, and it was held that the daughter having entered under the will, the defendant claiming under her was estopped as against all those in remainder, from disputing the validity of the will, and that the plaintiff was entitled to recovery.

MELLOR, J., said, "The only person who could dispute the possession of Rebecca, under the will, was the heir-at-law. He never disputed the possession, and his title to the estate is barred by the operation of the statute of limitations. A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder, who claim under the same will."

This case was decided, it is true, after the passage of the Stat. 3 and 4 Will. IV., but the claim of title and possession by the daughter, being hostile and inconsistent with the title of the heir-at-law, her possession was adverse under the Stat. 21 Jas. I., as against the lawful title. And being adverse, the heir-at-law must bring his action within twenty years, or his title will be barred by the statute of limitations. It is better, says the law, that the negligent owner who has omitted to assert his right within the time prescribed by the statute, should lose his rights than one should be disturbed in his possession, and harassed by stale demands after the proof on which his title rests may have been lost or destroyed. But whatever may be the reasons or the policy of the law, twenty years' adverse possession is a bar to the title, without regard to the original right of the parties.

The possession being adverse and exclusive in this case, the only remaining question is, whether it has been continuous for twenty years? And this depends upon whether the possession of Doctor Wroth can be united, or in other words tacked to the possession of the appellee.

Now the possession of several distinct occupants of land between whom no privity exists cannot, it is true, be united to make up the statutory period, for the reason if one quits or abandons the possession, the owner will be deemed to be in the constructive possession of the property by reason of his title. The separate successive possessions in such cases do not aid each other, and their several possessions cannot therefore be tacked, so as to make a continuity of possession.

But we take it to be well settled that where there is a privity of

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estate between the successive parties in possession then the possession of such parties may be united so as to make the twenty years required by the statute. And it is equally well settled that such privity may be created by a sale and conveyance and possession under it, as well as by descent. As was said by TILGHMAN, C. J., in *Overfield v. Christie*, 7 S. & R. 177, "One who enters upon the land of another and continues to reside on it acquires something which he may transfer by deed as well as by descent, and if the possession of such person, and others claiming under him, added together, amounts to the time limited by the act of limitations, and was adverse to him who had the legal title, the act is a bar to a recovery." Angell Lim. 414, 420; Wood Lim. § 271; Tyler Eject. 910.

In this case there was an adverse and exclusive possession of the farm in question by Doctor Wroth for thirteen years. He then united with George A. Hanson, the remainder-man, in a sale and conveyance to the appellee, who immediately entered and has continued in possession up to the present time; the possession of the appellee thus added or tacked to the possession of Doctor Wroth, makes a continuous adverse possession of twenty-seven years. The possession under such circumstances is by the statute of limitations a flat bar to the right of the appellants as heirs-at-law. The judgment below must therefore be affirmed.

Judgment affirmed.

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(33 Md. 231).

Criminal law — bawdy-house — evidence of reputation.

To prove the charge of keeping a bawdy-house evidence of the general reputation of the house is inadmissible. (*See note, p. 209.*)

CONVICTION of keeping a bawdy-house. The opinion states the case.

L. Hochheimer, for appellant.

Edgar H. Gans, for appellee.

MILLER, J. The indictment against the appellant contains two

counts. The first, with the usual appropriate averments in such cases, charges that on the 1st of April, 1883, and on divers other days between that day and the taking of this inquisition, he kept and maintained a "certain common bawdy-house," and the second charges him in the same manner with having kept during the same period "a certain common, ill-governed and disorderly house." At the trial, upon the plea of not guilty, the State, to maintain the issue on its part, proved and gave in evidence that the character of the house specified in the indictment, in the community in which it was situated, was that of a common bawdy-house or house of ill-fame, during the time mentioned in the indictment. The traverser objected to the admission of this testimony, but the court overruled the objection and allowed the evidence to go to the jury. To this ruling the traverser, by his counsel, objected, and the jury having rendered a verdict of guilty, he has appealed.

The question is thus distinctly and sharply presented whether under the first count in this indictment evidence that the character of the house in the community in which it was situated was that of a common bawdy-house or house of ill-fame, is admissible as tending to prove that the traverser was guilty of the crime which that count charges him with? Counsel on both sides have with commendable diligence collected in their briefs all the authorities bearing upon the subject, and they certainly present much conflict and diversity of judicial opinion and decision. They consist altogether of cases decided by the courts in this country and of the conclusions drawn therefrom by our own American text writers. No English decision is referred to and we are not aware that the question has ever been decided by an English court; and in considering the question as it arises in this State and in this case it must be remembered that the indictment is for a common law offense, there being no statute in Maryland, as there is in many of the States, upon the subject of bawdy-houses. At common law a "bawdy-house," or a "house of ill-fame," in the popular sense of the terms, is a species of disorderly house and is indictable as a nuisance. 3 Greenl. Ev. § 184; 2 Whart. Cr. Law. § 2392. Hence this indictment charges that the acts and conduct specified and set out therein, are "to the great damage and common nuisance of all the liege inhabitants of said State there inhabiting, residing and passing." The offense does not consist in keeping a house reputed to be a brothel or bawdy-house, but in keeping one that is actually such.

In the States which have statutes upon the subject, the decisions turn, in a great measure, upon the construction and particular language of these statutes, and of course to that extent, can have little or no application to the question as it is presented in this case. In others a distinction is drawn between the terms "bawdy-house" and "house of ill-fame," and they hold that where the latter terms are employed they are to be taken in their strict etymological sense, and that they put directly in issue the fame or reputation of the house itself, and hence that it is both permissible and necessary to prove that reputation in the only way in which it can be proved. Others again ignore this distinction and hold the terms to be synonymous.

In speaking of all these authorities Mr. Bishop, after stating the proposition in which they all agree (and to which we assent), that it is competent in all such cases to prove by general reputation the character for lewdness of the inmates of the house and of those who frequent and visit it, though such evidence pertains in a certain sense to hearsay, says: "Some carry this doctrine a step further and accept the reputation of the house for bawdy, as competent evidence *prima facie* that it is a bawdy-house. Others, and probably the majority, reject the evidence in accordance with the humane principle that a man shall not be condemned for what his neighbors say of him." 2 Bish. Crim. Pr., §§ 112, 113. And in our opinion a majority of the best considered decisions so hold, and upon correct principles, that such evidence is inadmissible in cases like this at common law. Thus in *Cadwell v. State*, 17 Conn. 467, STORRS, J., speaking for the court, in an extremely well reasoned opinion, after holding that upon the proper construction of the Connecticut statute under which the prosecution was had, it was necessary for the prosecutor to prove in the first place the general reputation of the house, and in the next its actual character as a brothel, and that such reputation of the house could be proved like any other fact by the testimony of witnesses having knowledge of its existence, and in the same manner as the reputation of a person for truth or any other quality is proved, distinctly says: "Testimony as to the reputation of the house would clearly be inadmissible for the purpose of proving that it was in truth a brothel, and such testimony, if offered for that purpose, would be obnoxious to the objection that it is mere hearsay." So in the more recent case of *State v. Boardman*, 64 Me. 523, where the statute among other

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things declared that "all places used as houses of ill-fame, resorted to for the purpose of lewdness or gambling are common nuisances," and therefore, in this respect, merely re-enacted the common law, a party was indicted for keeping a house of ill-fame, and the question was distinctly presented whether evidence of the reputation of the house as being a bawdy-house was admissible. The court, after holding that the offense charged was that of a common nuisance, that the terms "house of ill-fame" and "bawdy-house" are synonymous, and that the gist of the offense consists in the use and not in the reputation of the house, decided that the testimony was inadmissible because it was mere hearsay evidence, and that on trial of an indictment for a nuisance it is not admissible to show that the general reputation of the subject of the nuisance was that of a nuisance. The judgment in that case was reversed because of the error in admitting such evidence, and all the judges concurred in the curt remark or note of Judge PETERS that "the house must be proved to be a house of ill-fame by facts and not by fame." And in the still more recent case of *Toney v. State*, 60 Ala. 97, it was held that under an indictment for keeping a bawdy-house, evidence of the general reputation of the inmates of the house, but not of the house itself, is admissible for the prosecution. A similar ruling was also made in *State v. Lyon*, 39 Iowa, 379, where the indictment was for "leasing a house for the purpose of prostitution and lewdness." In the District of Columbia, where the common law on the subject prevailed, two cases arose directly involving the admissibility of such evidence. The first was that of the *United States v. Gray*, 2 Cranch C. C. 675 (decided in 1826), where the testimony was admitted (the Chief Judge CRANCH doubting), but this decision was overruled by the second and subsequent case of *United States v. Jourdain*, 4 Cranch C. C. 338, decided in 1833, in which THRUSTON, J., is reported to have changed his opinion since the case of *United States v. Gray*, and a majority of the court held the evidence inadmissible, thus settling the law for that court upon this question, for the only point decided in *United States v. Stevens*, 4 Cranch C. C. 341 (which has some times been referred to as sustaining the admissibility of such evidence), was that the general reputation of persons who frequented the house was admissible. Where the charge is simply that of keeping "a common disorderly house" the authorities, almost without exception, exclude this species of evidence, and hold that the nuisance must be shown as an existing

fact, and not by evidence of reputation. *State v. Foley*, 45 N. H. 466; *People v. Mauch*, 24 How. Pr. 276; *Com. v. Stewart*, 1 Serg. & Rawle, 342.

These decisions all rest, as it appears to us, upon the elementary rule of evidence which excludes hearsay testimony. The common law is studiously careful to exclude such testimony, and does not allow its introduction in order to convict parties on trial for common law offenses. We take it to be clear that a man's general bad character or reputation cannot be brought up against him when he is on trial for a specific crime, unless he first opens the way by an attempt to prove his good character. And we hold it to be equally clear that the fact that a crime has been committed cannot be proved by common rumor or general repute. The decisions which hold this evidence admissible (where they are not founded on the language or interpretation of a statute), seem to rest its admissibility mainly upon the ground of necessity, or rather the difficulty of obtaining direct evidence, because the operations of such houses are necessarily shrouded in secrecy. But when it is open to the prosecution to prove the general bad character for chastity of the female inmates of the house, that it is frequented by reputed strumpets, and that men are seen to visit it at all hours of the night as well as the day, we do not think there can be any very great difficulty in obtaining such direct evidence as will warrant a jury in convicting. If however such difficulty or necessity does in fact exist, a remedy can be easily and speedily provided by legislation changing the rules of evidence for such cases. It is not the province of the courts to change or relax these rules in order to facilitate convictions in a particular class of offenses. We cannot convert the common saying "what everybody says must be true," into a legal maxim, nor can we justify the introduction of such evidence upon the ground that it will do no harm, because it "may very rarely occur that a place acquires the general reputation of being a bawdy-house without being one in fact." Until the Legislature intervenes and prescribes differently the same rules of evidence must govern the trial of a party accused of this offense, which govern in all other criminal trials, and which have so governed from the time trial by jury under the common law was first instituted.

For these reasons we hold there was error in the ruling excepted to, and the appellant is therefore entitled to a new trial.

Ruling reversed and new trial awarded.

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NOTE BY THE REPORTER.—See 43 Am. Rep. 66, 527; *King v. People*, 88 N. Y. 587.

In a prosecution for keeping a house of ill-fame the prosecution was permitted, over objection, to prove by general rumor that the defendant was in the habit of sleeping in the house of ill-fame. The court's explanation of the bill of exceptions shows how this evidence was elicited. That the State asked the witnesses if they knew where the defendant slept? If he slept at the house? If they had seen him sleeping at the house? *Held*, that such questions were competent, but the answers to them, if founded upon common rumor and not upon personal knowledge, were inadmissible, and the proper practice would have been to move the court to exclude the answers, instead of objecting to the questions. While it is true that the character of the house as a house of prostitution, and the character of the inmates and the persons who frequent it, may be proved by general reputation, the fact that a defendant is the keeper of such house cannot be shown by such evidence. *Allen v. State*, 15 Tex. App. 220. The court said:

"Overobjection of defendant the court permitted the witnesses to prove that from hearsay and general reputation (and not from their personal knowledge) defendant kept the disorderly house. This presents the question, can the fact as to who is the keeper of a disorderly house be proven by general reputation? It has been held time and again that proof by general reputation that the house is kept for purposes of prostitution is both admissible and sufficient to establish its character as a disorderly house. *Morris v. State*, 38 Texas, 603; *Sylvester v. State*, 42 Texas, 496; *State v. Smith*, 29 Minn. 192. And the character of the occupants and parties resorting to said house may also be established by similar testimony. *Sylvester v. State*, *supra*. These are however different questions from the one here propounded. General reputation as to the character of either the house or its occupants—the purposes for which the house is kept or resorted to—may well be subjects of general reputation; "for by the characters of such frequenters its business is advertised and the intent of the keeper is evinced. * * * And though reputation pertains in a certain sense to hearsay, it is still proper evidence of character." 2 Bish. Crim. Proc. (3d ed.), §§ 112–116.

Mr. Bishop says, speaking of the keeper: "Keeping does not necessarily require ownership, even such as is created by a lease and occupancy thereunder, but it is constituted by such control over the house and its inmates as pertains to the head or heads of a household. A prostitute merely occupying a room is not a keeper. And one may become a keeper in law by aiding the keeper in fact. Moreover, one who holds himself out as keeper is presumed to be such." 2 Bish. Com. Proc., § 118. See also *Desty's Amer. Crim. L.*, § 1066.

A case very much in point upon the question is *State v. Hand*, 7 Iowa, 411. Chief Justice WRIGHT in that case says: "The offense charged is defined by the law to consist in keeping a house of ill-fame, resorted to for the purpose of prostitution or lewdness. The indictment is against the keeper, and not against the house as a nuisance. To convict, the house must be shown to be a house of ill fame, resorted to for the purpose named, and that defendant was the keeper of it. Particular acts of lewdness or prostitution need not be

proved. The counsel for the defendant admit this much, and also that the character of the house may be fixed or shown by reputation or rumor. The objection is that the defendant cannot be made liable as the keeper of such a house by evidence of 'common reputation as to his character.' And this objection we believe to be well taken. The bad character of the prisoner is entirely immaterial in the first instance, in determining whether he was the keeper of the house. And that he was the keeper must be shown in order to convict. * * * But the jury may conclude that he was such keeper by proof that he acted as such, or so held himself out to the world. Common reputation as to his character however is quite a different thing, and is not admissible to prove the crime here charged." 7 Iowa, 411.

"If common reputation as to his character is inadmissible, *a fortiori* it ought to be inadmissible to prove the fact that he kept the house. Evidence of rumor or common report of a fact is not admissible if better evidence is obtainable; and certainly better evidence ought to be obtainable than mere common report or general reputation as to the fact here sought to be proved."

In *King v. State*, 17 Fla. 189, the court said: "Not only the reputation of the house so informed against, but also the reputation of those who visit it, may be inquired into. It would be difficult to prove particular instances of the offense which gives character to such a house, in order to convict its keeper. It is this very character acquired by it as the resort of prostitutes and lewd persons that makes it criminal in the eye of the law. Having established a reputation among the citizens of the district, that reputation may be proved in the same way as may the general character of an individual witness. 2 Bishop C. P., § 112, etc.; *State v. McGraw*, 41 N. H. 406; *Commonwealth v. Gannett*, 1 Allen, 7; *Commonwealth v. Kimball*, 7 Gray, 328; *State v. McDowell*, Dudley (S. C.), 346; *Cadwell v. State*, 17 Conn. 467; *State v. Hand*, 7 Iowa, 411.

"We are aware that the courts of some of the States have held that evidence of reputation of the house as a house of ill-fame is not admissible, but believe the better rule to be that adopted in Connecticut. In that State the language of the statute is precisely similar to our own, 'keeping a house of ill-fame resorted to for the purposes of prostitution or lewdness,' and the courts of that State have held that by force of these particular words, it is both permissible and necessary to prove the reputation of the house

"The case cited by defendant's counsel from 89 Iowa, 889, 879, *State v. Lyon*, is not applicable to this case. There the indictment was found upon a statute against a lessor for leasing a building 'for the purpose of prostitution and lewdness,' and the 'ill-fame' of the house was not in question, therefore the evidence was not admissible."

Evidence of reputation as to the character of the house is admissible for the prosecution upon the trial of an indictment for keeping a house of ill-fame, and proof of particular acts of lewdness in the house is not absolutely necessary to establish guilt. *Betts v. State*, 98 Ind. 375; *Territory v. Stone*, 2 Dakota, 155; *Drake v. State*, 14 Neb. 535.

Upon a trial of one indicted for keeping a house of ill-fame it is admissible to prove that there were girls in the house, and that men and women were taken there at all hours of the night.

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In such a case when a witness had testified that he stopped all night with a girl, one of the inmates, in the house. it is admissible to show that he soon after suffered from a disease.

In such a case it is admissible to show conversation in the house by its inmates in the presence of the respondent. *State v. Garing*, 75 Maine, 591. See also a. c., 74 Maine, 152.

ADAMS V. COST.

(33 Md. 264.)

Master and servant — negligence — course of employment.

The plaintiff put his mare in the defendant's livery stable for keeping, instructing a servant of the latter to exercise her, but this was not part of the contract of keeping. The mare died in consequence of immoderate riding by the servant. *Held*, that the defendant was not responsible.

ACTION for negligently killing a horse. The opinion states the case. The defendant had judgment below.

Hy. Kyd Douglas, for appellant.

H. H. Keedy, for appellees.

YELLOTT, J. A suit was instituted in the Circuit Court for Washington county by the appellant against the appellees, for the recovery of damages, resulting from a killing of a horse belonging to the plaintiff in the cause. The trial in the court below terminated in the rendition of a verdict and judgment for the defendants, and the plaintiff has brought the questions involved in controversy, into this court by an appeal from said judgment.

The evidence adduced by the plaintiff tended to prove that the defendants were the keepers of a stable at which the plaintiff's mare had been put at livery. The defendants were instructed by the plaintiff not to let the mare go out to any one but himself, and not even on his own written order. On several occasions the plaintiff had instructed Briscoe, a servant of the defendants, employed at the stable, to ride the animal out for exercise, the plaintiff watching him while doing so; had given him no general directions to ride

In relation to the liability of masters for the acts of their servants it was said in *Ellis v. Turner*, 8 T. R. 533, "They are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them." And HOLT, C. J., said in *Middleton v. Fowler*, 1 Salk. 282, that "No master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master."

In 2 Rolle Abr. 553, it is said: "If my servant, without my notice, put my beasts in another's land, my servant is the trespasser and not I; because by the voluntary putting of the beasts there without my assent he gains a special property for the time, and so to this purpose they are his beasts." In *M'Manus v. Crickell*, 1 East, 106, Lord KENYON, referring to the two last cited authorities, observed: "Now when a servant quits sight of the object for which he is employed and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt, his master will not be answerable for such act. Such upon the evidence was the present case, and the technical reason in 2 Rolle Abr., with respect to the sheep applies here; and it may be said that the servant, by willfully driving the chariot against the plaintiff's chaise, without his master's assent, gained a special property for the time, and so to that purpose the chariot was the servant's. This doctrine does not militate with the cases in which the master has been holden liable for the mischief arising from the negligence or unskillfulness of his servant who had no purpose but the execution of his master's orders."

In *Coleman v. Riches*, 16 C. B. 104, it was held that a master is responsible for the negligence of his servant acting in the course of his employment, but not for an act of negligence done by him out of the scope of his authority. And in *Lyons v. Martin*, 8 Adol. & Ell. 512, it is said that a master is liable for damage resulting from his servant's negligence in doing a lawful act in the course of his service, but not so if the act is in itself unlawful, and if not proved to be authorized by the master. And it has been held that if a servant is employed to do a lawful act, and in doing it he commits a public nuisance, the master is not responsible. *Pouchey v. Rowland*, 13 C. B. 182. This doctrine is however limited and con-

trolled by the very obvious qualification, that if the act to be done necessarily involves the committing of a public nuisance, the master is liable. So in all cases where a wrongful act is done by the authority of the master. *Ellis v. Sheffield Gas Consumers' Company*, 2 Ell. & Bl. 767. But where the act is done by the servant in pursuing his own objects, lying beyond the sphere of his proper duties as a servant, the master is not liable. Thus it has been held in *Joel v. Morison*, 6 Carr. & P. 501, that if a servant takes his master's cart without leave, at a time when it is not wanted for the purpose of the business, and drives it about solely for his own purposes, the master will not be liable for any injury which he may do. And where a carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out his master's horse and cart, and on his return ran against a cab, it was held that the master was not liable for the injury thus resulting from the servant's negligence. *Rayner v. Mitchell*, 2 Com. Pl. Div. 357; s. c., 21 Eng. R. 323.

Chancellor KENT announces it as an established principle, that a master is not answerable for the tortious acts or misconduct of his servant in those things which do not concern his duty to his master and are not done in the course of the service, 2 Kent Com. 284. In *Wright v. Wilcox*, 19 Wend. 343, the same principle is enunciated; and in *Foster v. Essex Bank*, 17 Mass. 478, which was a case of bailment, and where the loss resulted from the act of the bailee's servant, it was decided that "a bailee for hire or reward will not be liable if the goods are stolen, if he shows that he used due care in the keeping of them." In this case Chief Justice PARKER, in his very learned and elaborate opinion, speaking of bailment for hire and reward, says: "The principle applicable to this species of bailment goes no further than to make the bailee liable in case of ordinary neglect; so that if he shows that he used due care, and nevertheless the goods were stolen, he is excused." And he further adds, "This is the doctrine of Sir WILLIAM JONES, and was the opinion of Lord KENYON in the case of *Finnucane v. Small*."

It has been repeatedly decided in the courts of the United States that the obligation imposed on a bailee for hire is that of ordinary care and diligence. *Rerves v. The Constitution*, Gilpin, 585; *Bank of Kentucky v. Adams Express Co.*, 1 Flip. 256.

If a bailee employs others to transact the business intrusted to

him, it has been held that his liability only extends to the injury resulting from the negligence of such persons while acting within the scope of their designated duties. If the injury complained of has been occasioned by the misconduct of the agents or servants of the bailee, while not engaged in the performance of the service specially assigned to them by the bailee, the latter is not responsible in damages for any loss resulting to the bailor from such misconduct. *White v. Commonwealth Nat'l Bank*, 4 Brewst. 234; *Pelham v. Pace*, Hempstead, 223.

There has never been any deviation from the doctrine established by the authorities referred to, and the citation of other cases for the purpose of demonstrating the universality of its recognition would seem to be a mere work of supererogation. The decisions already cited are declaratory of a fundamental rule of the common law, which unlike positive regulations emanating from an exercise of legislative authority, is a system of jurisprudence that by adopting the language of a very able and eminent writer on the subject, can be accurately defined as "consisting of principles which, although not properly susceptible of that expansion which works a change in the principle, are not restricted and tied down by the circumstances of their prior application, but do admit of that expansion that merely displays the hitherto unapplied capacity of the principle." In the cases to which reference has been had there is an exposition of the legal relations of master and servant. The principle enunciated is that a master is not responsible for the acts of his servant unless the latter was engaged in the performance of the service for which he was employed. When we come to its application in the pending controversy we discover a very different category of facts from those presented in Rolle's Abridgment, and yet the principle is clearly applicable. In the defendant's second prayer, to the granting of which an exception has been taken, it is left to the jury to find whether the servant of the defendants was, at the time when the injury occurred, acting under the instruction and direction of the plaintiff. If this question of fact should be determined in the affirmative by the jury, then by no process of ratiocination could it be made demonstrable that he was acting under the authority of the defendants. On the contrary, we are irresistibly and logically led to the conclusion that he was then acting independently of that authority and consequently not within the limits of his assigned employment as the defendants'

servant. Then the principle enunciated in Rolfe's Abridgment, in 1 East, and in the other cases cited strictly applies. As this fact was properly left for the ascertainment of the jury there was no error committed by the Circuit Court in granting the defendants' second prayer. If the facts hypothetically stated in this prayer were believed by the jury the defendants were not liable for the injury alleged in the declaration.

The third prayer of the plaintiff was properly rejected. He had already obtained all the instructions he was entitled to in his first and second prayers, and this third prayer is apparently only a reproduction of those instructions. Its phraseology moreover renders it objectionable because of its probable tendency to confuse and mislead the jury. There cannot therefore be a reversal of the judgment because of the rejection of this prayer by a divided court.

Judgment affirmed.

ALVEY, C. J. I quite agree to the affirmance of the judgment in this case but for other reasons than those assigned in the opinion of my brother Yellott. The action is for an alleged breach of a contract of bailment. The plaintiff's horse was put at livery to be safely kept, dressed and fed, in the stable of the defendants, for a certain price per month; and the alleged breach of the contract is that the horse was allowed to be taken out of the stable by one of the hands or employees of the defendants about the stable, who rode the horse to death. There is no dispute in regard to the contract, or in regard to the fact that the horse was taken out of the stable and ridden to death by one of the employees of the defendants. But the defense is that the horse was taken out and ridden by the servant under the direction and by the authority of the plaintiff, and not of the defendants; and that being so they, the defendants, are not responsible for the consequences of the servant's negligence or recklessness in riding the horse to death.

The defendants as bailees were certainly responsible for the want of good faith in the keep of the horse and for any want of reasonable care and diligence in that respect; and as the negligence of the servant, acting under the master's directions, express or implied, is the negligence of the master, it follows that if the servant employed to attend to the horse by the defendants, injured or killed it by riding it immoderately, the defendants must make compensation for the loss. Jones Bailm. 89; *Coggs v. Bernard*,

2 Ld. Raym. 916. In Jones on Bailment, page 91, the learned author in discussing the doctrine of bailment, *locatio custodiam*, says: "If a horse be delivered either to an agisting farmer for the purpose of depasturing in his meadows, or to an hostler to be dressed and fed in his stable, the bailees are answerable for the loss of the horse, if it be occasioned by the ordinary neglect of themselves or their servants. It has indeed been adjudged that if the horse of a guest be sent to pasture by the owner's desire, the innholder is not as such responsible for the loss of him by theft or accident;" and the author cites *Cayle's case*, 8 Co. 32, where it was held that if the horse of a guest at an inn be stolen, the innkeeper is not liable if the horse was put to pasture at the guest's request, but otherwise if the innkeeper had put the horse to grass of his own head. And while the liability of an innkeeper is very different from that of an agister or livery-stable keeper, yet the rights and liabilities of the parties in this case are well illustrated by what was decided in *Cayle's case*. The obligation of the defendants was to take reasonable and proper care of the horse while intrusted to their care as liverymen (*Smith v. Cook*, 1 Q. B. Div. 79; s. c., 15 Eng. R. 194; *Sargeant v. Slack*, 47 Vt. 674; s. c., 19 Am. Rep. 136); but though such was their obligation, if the plaintiff himself interposed and gave special directions to the servant, as to the manner of treating the horse, conferring authority to ride and exercise it, a service that the defendants had not assumed, and that it was while acting under such special authority that the accident occurred, the defendants as liverymen clearly would not be responsible. In such case the servant in charge of the horse would not be the servant of the defendants, but that of the plaintiff, *pro hac vice*. But on the other hand if the horse was taken out and ridden, upon the occasion of its death, by the authority, express or implied, of the defendants, or that its being taken out and ridden was by reason of the want of ordinary care and diligence in the keep of the horse, by the defendants or their servants, then the defendants would be liable for the loss of the horse. And these propositions, we think, were fully submitted to the jury in the instructions that were granted by the court below.

The first and second instructions given by the court, at the instance of the plaintiff, would seem to have embraced the entire ground upon which the plaintiff's claim to recover could rest, under the facts of the case. And therefore the rejection

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of the third prayer of the plaintiff, even conceding that it was otherwise free from objection, was not erroneous, because the legal propositions involved in it were embraced in the instructions actually given. Its rejection therefore could work no injury to the plaintiff. And as to the second prayer offered by the defendants, which was granted, that simply enunciated distinctly the principle that if the plaintiff interposed to give special directions and authority to the servant for service beyond that assumed by the defendants, as to the treatment and use of the horse, and it was in the exercise of that authority that the accident happened, the plaintiff could not recover; and clearly there was no error in granting that instruction. It follows from these views that the judgment ought to be affirmed.

Judges MILLER, ROBINSON and STONE concur with me in thus disposing of the case.

Judgment affirmed.

BARNUM V. MAYOR, ETC., OF BALTIMORE.

(63 Md. 275.)

Will — charitable — trust — certainty.

A will provided a devise and bequest to the city of Baltimore in trust for the "McDonogh Educational Fund and Institute." There was no such corporation, but there was an organization under an ordinance of the city of Baltimore, called "Board of Trustees of the McDonogh Educational Fund and Institute," and supported by funds from McDonogh's estate, which carried on a "School Farm" known as the "McDonogh Institute. Held, that the trust was sufficiently certain and was valid.*

BILL to determine rights under a will. The opinion states the case. The defendant had judgment below.

Thomas A. Wheelan and John H. Thomas, for appellants.

James L. McLane, city counsellor, and I. Nevett Steele, for appellees.

* *Quinn v. Shields* (63 Iowa 129), 49 Am. Rep. 141.

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ALVEY, C. J. [Omitting other points.] We come now to the second question, and that is, whether the objects and purposes, and the beneficiaries of the trust, are sufficiently certain and defined to render the trust valid, and to enable a court of equity, by virtue of its inherent jurisdiction and power over trusts, to enforce the trust, in accordance with the plan and intent of the testator. And of this we entertain no doubt.

In the event that has occurred, the testator devised and bequeathed the rest and residue of his estate to the mayor and city council of Baltimore, in trust, for the McDonogh Educational Fund and Institute, to be applied to establishing a chair therein, to be called the "Zenuss Barnum Chair," to promulgate such course of instruction in said institute as will aid in the practical application of the mechanical arts. He then declares that the property so given shall be held under the same control and direction as the estate and property now held by said fund and institute, and to be so appropriated and applied as to give boys in that institution such useful and practical mechanical education as will enable them to gain a livelihood by skillful manual labor. This is certainly a benevolent and charitable design, and falls fully within the legal definition of a charity. It is therefore entitled to the most liberal construction for its support.

As we have already stated, it is conceded that there never has been any such incorporated body as the "McDonogh Educational Fund and Institute," but that there has been for many years, and still is in existence, a municipal organization or agency, constituted by ordinance of the city, under the name and style of the "Board of Trustees of the McDonogh Educational Fund and Institute," for the administration of the educational fund derived under the will of McDonogh. This board is clothed with large powers for the management of the fund, and for keeping intact their own body. It appears that the funds derived from the McDonogh estate not being sufficient to establish and maintain the free school or schools contemplated by McDonogh, such funds have been devoted exclusively to the purchase, the establishment and maintaining of the "School Farm," authorized and directed to be maintained by the will. This farm, with its organized school thereon, — with its teachers and pupils, — is known as the "McDonogh Institute." And this "School Farm," and school thereon, are by ordinance of the city under the exclusive management and control of the "Board

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of Trustees of the McDonogh Educational Fund and Institute." By the ordinance constituting the board and defining its powers, it is provided that "all the money, securities, and property of every kind and description, with the increment thereof, which has or may come to the city (from the McDonogh estate), shall pass to and be vested in said board of trustees."

Now with respect to the intention of the testator, in view of all the admitted facts of this case, we cannot perceive that there is any well grounded room for doubt, that he intended the estate given to be managed and controlled by the "Board of Trustees of the McDonogh Educational Fund and Institute," and that it should be applied by that municipal agency, in the manner designated in the will, in connection with and as part of the "McDonogh Institute." That is the only educational institute, founded upon the McDonogh fund, to which he could have referred; and we must suppose that he knew perfectly well how that charity was organized and by what agency it was controlled. And that being so, what uncertainty or difficulty can there be in the application of the fund to the purpose and objects designated by the testator? If the city was capable of taking and organizing for the administration of the McDonogh fund, why should it not be equally capable of taking and applying of the Barnum Fund? Seeing that both funds have a common object to subserve, and that the latter is but an adjunct to the former, and both being in aid and promotive of the general objects of the municipal corporation, both are equally within and subject to the administrative control of the agency instituted by the city ordinance.

It is objected that the "Board of Trustees of the McDonogh Educational Fund and Institute" is not an incorporated body; and that "The McDonogh Institute" is not situated within the limits of the city: and therefore the beneficiaries of the trust are uncertain and undefined, and without legal identification as a body; and that the school or institute, being beyond the limits of the city, the fund does not constitute a trust for the benefit of the citizens of the municipality, within the meaning of the charter. But in neither of these objections do we perceive that there is any such insuperable difficulty in maintaining the validity of the trust, as is supposed by the objectors.

The municipal corporation, taking the fund in trust, takes it for the benefit of its citizens or the public, to be applied according to

the terms of the trust. It is therefore in a certain sense *cestui que trust*, as well as trustee. The property acquired by it, though in trust, is for a public use; and the corporation is liable for the execution of the trust by and through the agencies it may create for the purpose. It is not the agencies of the municipal corporation so much to which we must look for the execution of the trust as to the corporation itself. Therefore if the present bequest, instead of being to the city in trust for an educational purpose, had been to the city in trust to establish or maintain a house of correction, a hospital or pest-house, within or without the city, there can be no doubt of the validity of such trust and that the objects would be sufficiently defined, notwithstanding the trustees or managers of such institutions appointed by the city had never been incorporated by law. And that being so, there can be no substantial reason assigned why the present bequest is not equally good. Nor is the fact that the "McDonogh Institute" is located beyond the limits of the city, a substantial objection to the validity of the trust. The institute or school farm is managed by city agencies, and for the benefit of the citizens of the corporation; and there is nothing to forbid, either in the bequest itself or in the charter of the city, the present location of what is known as the "McDonogh Institute." The ordinance providing for the board of trustees or managers, authorized the purchase of the farm, and the erection of the buildings thereon, in the vicinity of the city; and it has never been supposed that there was any legal objection to the power thus conferred upon the managers.

Lastly, it has been very earnestly argued against the validity of this trust, that there is no power or jurisdiction by the exercise of which the trust can be enforced; that if it be established, to use the strong language of the brief, "no power on earth can prevent the corporation from using the property for the establishment and maintenance of a pest-house or an alms-house; for the support of its fire department, or its water department, or for any other corporate purpose." And if such proposition were maintainable upon authority we should desire no further argument to justify us in declaring against the validity of the trust. But we are far from acceding to the correctness of the position thus assumed on the part of the appellants, as applied to a case like the present. No principle is now better settled than that where property is held by a municipal corporation in trust, or where the trust reposed in the corporation is

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for a charity within the scope of its duties, a Court of Chancery will prevent the misapplication of the trust funds and compel the execution of the trust. And this jurisdiction is not founded upon the statute of 43 Elizabeth, but is part of the original inherent jurisdiction of the Court of Chancery over the subject of trusts. The court will interpose and exercise its jurisdiction at the instance of the attorney-general, or according to many authoritative precedents, upon the application of the corporators or persons interested. The result of the authorities upon the subject is well stated by Judge Dillon in his work on Municipal Corporations; and without doing more we may refer to that valuable work and the case there collated by the learned author. 2 Dill. Mun. Corp. (3d ed.), §§ 567, 909; *Attorney-General v. City of Dublin*, 1 Bligh New Rep. 312.

It follows from what we have said, that in the opinion of this court, the decree appealed from must be affirmed; and it is so ordered.

Decree affirmed.

PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY V. HOEFLICH.

(33 Md. 300.)

Damages — exemplary.

To warrant exemplary damages there must be an element of fraud, malice, evil intent or oppression forming part of the wrongful act. Deliberation and force will not supply it.*

QUCTION of damages for wrongful ejection from a railway train. The opinion states the point. The plaintiff had judgment below.

Henry J. Bowdoin and John J. Donaldson, for appellant.

Charles Brandan and William A. Hammond, for appellees.

* To same effect, *Louisville, etc., R. Co. v. Guinan* (11 Lea, 98), 47 Am. Rep. 279; *Fitzgerald v. Chicago, etc., R. Co.*, 50 Iowa, 79. But see *Louisville, etc., R. Co. v. Garrett* (8 Lea, 438), 41 Am. Rep. 640.

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ROBINSON, J. [Omitting other points.] We come now to the only question about which we think there can be any difficulty in this appeal, and that is the question in regard to the rule of damages laid down by the court. If the plaintiff was wrongfully ejected from the train, she was unquestionably entitled to recover such damages as the jury might think, under all the circumstances, a proper compensation for the unlawful invasion of her rights as a passenger, and the injury to her person and feelings. To so much of the plaintiffs' prayer, there can be no objection. But in addition to such damages as these, the court instructed the jury, if the plaintiff was forcibly and deliberately ejected, they might give such exemplary damages, as they might think a proper punishment for the conduct of the defendant. The force and deliberation with which the wrongful act is done, are not necessarily the tests by which the question of punitive damages is to be determined. On the contrary, to entitle one to such damages there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act. It is in such cases as these that exemplary or punitive damages are awarded as a punishment for the evil motive or intent with which the act is done, and as an example or warning to others. But where the act, although wrongful in itself, is committed in the honest assertion of a supposed right — or in the discharge of duty, or without any evil or bad intention, there is no ground on which such damages can be awarded.

In *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 214, Mr. Justice CAMPBELL says: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations."

And in the still later case, in the same court, of *Milwaukee, etc., Railroad Co. v. Arms*, 91 U. S. 489, 493, Mr. Justice DAVIS said: "Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done wilfully, or was the result of that reckless indifference to the

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rights of others which is equivalent to an intentional violation of them. * * * The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages."

We might multiply the cases on this subject if necessary, all concurring that exemplary damages are awarded as a punishment for the evil motive, or intention with which the unlawful act is done, and as a warning or example to others.

The mere fact, that one is forcibly and deliberately ejected from a railroad car does not necessarily imply that it was done wantonly, or willfully, or with a bad motive, although the act may be in itself unlawful. Conceding then that the female plaintiff was wrongfully ejected from the car, the fact that it was forcibly and deliberately done are not the tests by which the plaintiffs' right to recover punitive damages is to be determined. On the contrary, before resorting to so extreme a measure, it was but proper that the conductor should have acted deliberately and not hastily or inconsiderately, and if the plaintiff refused to leave the car on being requested to do so, the use of force became absolutely necessary, the only question being whether the force thus used was excessive.

The case of the *Baltimore, etc., Turnpike v. Boone*, 45 Md. 344, on which the instruction of the court is based differs widely from the one now before us. There the company, in violation of its charter, had exacted illegal and excessive fares, and passengers were compelled either to pay the same or subject themselves to be expelled from the cars. It was under these circumstances the court held that public policy required the corporation should be liable to the highest measure of damages for the deliberation and force accompanying its illegal conduct. But there are no considerations of public policy that require the application of such a rule in a case like the one now under consideration. On the contrary, to entitle the plaintiff to recover punitive damages, according to all the decisions both in this country and in England, the jury must find that the wrongful act was done wantonly or willfully, or in the spirit of oppression. It is the evil motive or intention with which the wrongful act is done, says the Supreme Court, on which rests the rule of punitive damages.

The court was wrong therefore in instructing the jury that the plaintiff was entitled to punitive damages if they should find the wrongful act complained of was deliberately and forcibly done.

Judgment reversed and new trial awarded.

TWIGG v. RYLAND.

(23 Md. 380)

Animals — servant's knowledge of viciousness.

A servant's knowledge of the vicious character of a dog accustomed to follow him about in the master's business, but not put in his charge by the master, is not imputable to the master. (*See note, p. 229.*)

ACTION of damages for injury by the bite of a dog. The opinion states the point. The defendant had judgment below.

J. W. Thomas, for appellants.

William M. Price, for appellee.

ALVEY, C. J. The appellants in this case were the plaintiffs below, and they brought the action to recover of the defendant for injuries received by the female plaintiff by the bite of a dog, alleged to have belonged to or to have been kept by the defendant, with knowledge that the dog was ferocious and dangerous.

In regard to the law of the case it is well settled that if any person keeps an animal *mansuetæ naturæ*, of a ferocious or vicious disposition, accustomed to bite or attack mankind, knowing that it is possessed of such disposition or vicious propensity, he is bound to restrain such animal at his peril; and if he allows it to escape or go at large, he is liable for all the injury it may inflict by attacking persons in consequence of such ferocious propensity. As declared by the Queen's Bench, in *May v. Burdett*, 9 Q. B. 101: "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is, *prima facie*, liable in an action on the case, at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities." The owner or keeper of the dog or other domestic animal must be shown to have had knowledge of its disposition to commit such injury, and the burden of proving this fact is on the plaintiff, though it would be otherwise if the animal was of a nature to be fierce and untamable, such as bears, tigers, etc. *Spring Co. v. Edgar*, 99 U. S. 654. The notice which will charge the owner or keeper

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with liability for the vicious conduct of the animal must be notice that it was inclined to do the particular mischief that has been done. Hence, notice that a dog is ferociously disposed toward cattle is no notice that he will attack persons. It is not necessary to show that the owner or keeper of a vicious dog has seen the animal attack mankind; but it is sufficient to show that the vicious propensity of the animal has in some way been brought to the knowledge of the owner or keeper, so as to admonish him to take the necessary precaution to prevent injury in the future. Hence the question in each case is whether the notice was sufficient to put the owner or keeper on his guard, and to require him to anticipate the injury that has actually been done. And this duty of guarding against the vicious propensity of a dog or other domestic animal is imposed upon the keeper thereof, irrespective of the fact of ownership. Cooley Torts, 344.

The question presented by the first bill of exception is as to the admissibility of evidence to prove the *scienter*. After giving evidence of the injury inflicted by the dog, the plaintiffs gave evidence to prove that the defendant was a butcher in Cumberland and that he had about his premises a colored man as an assistant, who drove the meat wagon and delivered meat to the customers of the defendant, and that the dog was frequently with him and generally followed him. They then offered to prove that this colored man knew that the dog was vicious and dangerous and was disposed to attack and bite and injure persons; and that such colored man, while in the employ of the defendant, had told one of the plaintiffs' witnesses that he had made known to the defendant, before the injury to the plaintiff, that the dog was of a vicious disposition and had attacked and bitten other persons. To this offer the defendant objected and the objection was sustained by the court, and as we think rightly sustained.

It is very true, as shown by the authorities, that if the owner of a dog place it in the charge and keeping of a servant, the servant's knowledge of the dog's ferocious disposition is the knowledge of the master. But it is not true that the knowledge of any servant that a dog may follow or be with about the premises where he is employed, as to the disposition of the dog, is to be imputed to the master. This is clear upon all the authorities.

The case that goes as far upon this question as any other to be found in the reports and which has been mainly relied on by the

appellants is that of *Gladman v. Johnson*, 36 L. J. (C. P.) 153, where notice of the mischievous propensity of the dog, given to the wife of the defendant, who attended to the business of her husband in his absence, for the purpose of being communicated to the husband, was held to be some evidence of a scienter, to be considered by the jury. But in delivering judgment in that case, BOVILL, C. J. says: "I am not prepared to assent to the proposition that notice to an ordinary servant or even to a wife would in all cases be sufficient to fix the defendant in such an action as this, with knowledge of the mischievous propensity of the dog. But here it appears that the wife attended to the milk business, which was carried on upon the premises where the dog was kept, and that a formal complaint as to that dog was made to the wife when on the premises, and for the purpose of being communicated to her husband. It may be that this is but slight evidence of the scienter, but the only question is, whether it is evidence of it. I think it is." This case was referred to and commented upon in *Goode v. Martin*, 57 Md. 610, 611; s. c., 40 Am. Rep. 448. And in the case of *Stiles v. Cardiff Steam Nav. Co.*, 33 L. J. (Q. B.) 319, where a similar question arose, the lord chief justice said that notice of the vicious propensity of the dog given to porters or servants employed about the premises would not suffice; but that if brought home to a person who had the general management of the yard, in which the defendants themselves could not be supposed to be acting, and who had authority to say whether a dog should be kept there or not, or whether it should be chained up or not, it would be otherwise. The case of *Baldwin v. Cusella*, L. R., 7 Exch. 325; s. c., 3 Eng. R. 434, proceeded upon the ground that the defendant had deputed to his coachman the care and control of the dog, and therefore a notice to him of the vicious nature or propensity of the dog was notice to the master. And there is nothing in the case of *Appleby v. Percy*, L. R., 9 C. P. 647; 10 Eng. R. 334, that in any way contravenes the principle of the previous cases to which we have referred. We are clearly of opinion therefore upon the facts as stated in the bill of exception, that the knowledge, whatever it may have been, of the negro man in regard to the propensity of the dog was not legally imputable to the defendant; and especially were not the declarations of the negro man evidence against the defendant. The man himself should have been called as a witness.

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[Omitting minor considerations.]

Finding no error in the rulings of the court below we must affirm the judgment.

Judgment affirmed.

NOTE BY THE REPORTER. — See 36 Am. Rep. 751; 48 Am. Rep. 253, 40 Am. Rep. 448. When one employs an agent to control his farm and the property thereon, the agent's knowledge of the vicious habits of a dog owned and kept by the principal on the farm is the knowledge of the principal; and evidence which tends to show that the agent had such knowledge, is admissible in an action against the principal for damages caused by the dog. *Corliss v. Smith*, 53 Vt. 582.

Evidence tending to show that the other servants knew of the dog's evil propensity is admissible to prove such protensity, and being admissible, the court will not presume that the jury made an illegitimate use of it. *Corliss v. Smith*, 53 Vt. 582.

One who has charge of a vicious dog, whether as owner or bailee, knowing him to be vicious, must restrain him, and if he fails so to do he will be liable in damages to any person injured thereby. *Marcel v. Bowman*, 62 Iowa, 57.

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HANDY V. STOCKBRIDGE.

(62 Md. 422.)

Marriage — Husband's liability for counsel fees in wife's divorce suit.

A widow may not maintain an action against her husband's administrator for fees charged by her counsel for conducting her suit of divorce, pending which the husband died, but the counsel may maintain such action on affirmative proof that the divorce suit was justifiable *

ACTION for counsel fees. The opinion states the cases.

William T. Roberts and *John H. Handy*, for appellants.

Samuel Snowden and *Henry Stockbridge*, for appellees.

ALVEY, C. J. The question in these cases is raised by demurrer to the declarations. In the one case the widow sues to recover of the administrators of her deceased husband a sum with which to

* See *Conant v. Burnham* (183 Mass. 508), 48 Am. Rep. 532.

pay counsel fees for prosecuting a suit for divorce from her husband in his life-time, but which proceeding never reached a decree in consequence of the death of the husband. In the other case, the action is by the attorneys themselves to recover of the administrators of the deceased husband reasonable compensation for services rendered the wife in the divorce suit, as for necessities supplied to her.

1. As to the action by the wife, we know of no principle upon which it can be maintained. The action is not for alimony that has been awarded to the wife during the life-time of the husband, nor is it for money paid by the wife to the use of the husband, in discharge of an obligation imposed upon him by an order of court. But the claim sued on is for \$900, the amount demanded of the plaintiff by her counsel, and which she seeks to recover in her own right, that she may be enabled to meet the demand. It is clear, we think, that whatever implied assumpsit may have arisen on the part of the husband to pay counsel fees for services rendered in the divorce proceedings at the instance of the wife, such implied assumpsit was not raised to the wife, and she can have no right to maintain an action for any such claim. The court below sustained the demurrer to the declaration in this case, and this court fully concurs in that ruling.

2. As to the action by the attorneys, that stands upon different principles. The declaration alleges the employment of the plaintiffs by the wife; the institution of the proceedings by her for a divorce *a mensa et thoro* from her husband; the prosecution of the suit until the same became abated by the death of the husband; and that the services were necessary and reasonable for the wife, and were rendered during the life-time of the husband. The facts thus alleged are admitted by the demurrer, and the question is whether there was any implied obligation or assumpsit on the part of the husband to pay for the professional services rendered for and at the instance of the wife?

That a husband is liable for the necessities supplied to a wife who without fault or legal provocation has been compelled to leave or is justified in leaving him, and live separate and apart from him, is a proposition not disputed. But the question here is, whether the services sued for in this case can be regarded as necessities supplied to the wife, and for which she had power to contract on the credit of her husband.

It has long ago been held that where a wife was turned out of doors and threatened by her husband, and she employed an attorney to exhibit articles of the peace against him, the husband was liable to the attorney for the payment of his charges; for as was said by the court, whenever the husband by his conduct compels the wife to appeal to the law for protection, she may charge him for the necessary expense of the proceeding as much as for necessary food or raiment; and her solicitor may sue for his proper charges. *Shepherd v. Mackoul*, 3 Camp. 326; *Turner v. Rookes*, 10 Ad. & Ell. 47. And so it has been held that the husband's estate was liable for preliminary expenses incidental to a suit for the restitution of conjugal rights, instituted by the wife, but where before the suit came to a hearing the husband died, and no decree therefore was ever pronounced. *Wilson v. Ford*, L. R., 3 Exch. 63. In this last case cited, CHANNELL, B., said: "I think that where a suit was instituted, as it was here, for restitution of conjugal rights, and for alimony *pendente lite*, the expenses in relation to it were necessary to her as wife, and such as she was justified in incurring." And for costs and expenses necessarily incurred by the wife in filing a petition for judicial separation, although the petition was not proceeded with, it was held the husband was liable. *Rice v. Shepherd*, 12 C. B. (N. S.) 332.

In the case of *Brown v. Ackroyd*, 5 El. & B. 819, it was held that the proctor was not entitled to recover his costs for instituting proceedings for a divorce *a mensa et thoro*, because it did not appear that there was reasonable ground for the proceeding, that being necessary to entitle the wife to pledge her husband's credit for the costs of such proceeding; but it was fully conceded, and held by the court, that if that fact had appeared, the husband would have been liable. And in the case of *Stocken v. Patrick*, 29 L. T. Ex. (N. S.) 507, where it appeared that the wife had good ground for instituting a suit for separation, because of the cruelty of her husband, and her attorney having brought suit for a divorce on the ground of adultery and cruelty, which was compromised by an agreement for a deed of separation, the solicitor was held entitled to sue and recover of the husband for his costs as between attorney and client, including the costs as between attorney and client in the divorce suit. And so in the recent case of *Ottaway v. Hamilton*, 3 C. P. Div. 393, on appeal, it was held that a solicitor employed by the wife to take proceedings against her husband to obtain a divorce on

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the ground of cruelty and adultery, was entitled to sue and recover of the husband for extra costs, that is, costs reasonably incurred by him beyond the costs taxed and allowed as between party and party. In that case, Lord Justice BRAMWELL, in the course of his judgment, put the case we are now considering. "Suppose", said he, "a husband were to die after the petition was filed, but before the decree could be pronounced against him, would not the common law liability of his estate for the costs incurred by his wife continue in full force? I therefore think that the power of the wife to pledge her husband's credit remains unimpaired." And in conclusion he said: "Subject to the question whether they (the costs) have been justifiably incurred, the defendant is bound to pay them, just as if he had retained the plaintiff to act as his solicitor." But it is a condition of the right to recover that it be made to appear affirmatively that the suit of the wife against the husband was reasonably and justifiably instituted. *Hooper, In re*, 2 De G., J. & S., 91; *Brown v. Ackroyd*, 5 El. & B. 819.

In this State it has never been otherwise than that the husband has been required to pay the reasonable counsel fees for services rendered the wife in suits for divorce. The amount allowed has always depended largely upon the circumstances of the case, and the pecuniary resources of the parties. *Ricketts v. Ricketts*, 4 Gill, 105. The law upon this subject, as settled in several of the American States, is at variance with that of England, and according to the decisions of the courts of those States, this action could not be maintained. But the principle of the English decisions would seem to be more in consonance with our own practice, and we shall therefore follow them. We think the demurrer to the declaration in this case should have been overruled, and we must therefore reverse the judgment.

The judgment in the case of Mrs. McCurley is affirmed, and that in the case of John H. Hanly and William T. Roberts is reversed, and the cause remanded.

No. 85 affirmed, and No. 86 reversed, and cause remanded.

BALTIMORE AND OHIO RAILROAD COMPANY V. STATE.

(23 Md. 479.)

Railroad — duty toward trespasser — ordinance.

Compliance with a city ordinance requiring that "when a locomotive engine is used within the limits of the city, a man shall ride on the front of the locomotive engine when going forward, and when going backward on the tender, not more than twelve inches from the bed of the road," is not due to persons walking on the private way of the railroad company, at an uninhabited point and not at a street crossing, although in a path used by the public with the silent acquiescence of the company.

ACTION for negligent killing of the father of the equitable plaintiff. The opinion states the case. The plaintiff had judgment below.

John K. Cowen, for appellant.

B. R. Boorman and *John I. Yellott*, for appellee.

IRVING, J. [Omitting statements.] Upon this state of facts the appellee wholly relied for recovery upon alleged violations of the following ordinance of the city which was put in evidence: "When a locomotive engine is used within the limits of the city, a man shall be required to ride on the front of the locomotive engine when going forward, and when going backward on the tender, not more than twelve inches from the bed of the road; nor shall any locomotive be propelled at a greater speed than five miles per hour except where there are grades requiring greater speed, and then it shall not exceed six miles per hour; and the person or persons having charge of such locomotive engine shall ring a bell when approaching any and every cross street, and no steam whistle attached to any locomotive engine shall be used within the limits of the city, except at the Mount Clare and Camden stations, and between said stations and the city limits; for any violation of the conditions herein set forth, the company so violating shall forfeit and pay the sum of ten dollars for each and every offense."

It is claimed on the part of the appellee that this ordinance was violated in not having a person to ride in front of the engine within

twelve inches of the ground to look out and prevent accidents. It has also been shown that there was no bell rung, but as the ordinance only requires that to be done at the approach of street crossings, and there were no cross streets where this accident occurred, and they were not near enough to Fort avenue to require the bell-ringing to be begun for it, that can hardly be pressed as a sufficient omission to be of itself a cause of action in this case. Indeed it was not seriously insisted that it was.

To avail themselves of the confessed omission to do what the ordinance required of the railroad company in respect to the look-out in passing through the city, the appellee's counsel argued that notwithstanding this was the private right of way of the appellant, yet there was a path along the track, and people were in the habit of using it for the purpose of passing down to and from Fort avenue and beyond, so that it had become such a thoroughfare that the company in the use of its right of way for its engines and cars were under obligation to use it with special reference to this user by the public, and to exercise special caution in passing over the road to avoid injuring any one happening to be on the track.

In reply the appellant contends that from the mere permissive user of the path by the side of the track, the public had acquired no right to use it, and where there is no right there can be no obligation beyond that which ordinarily attaches to the use of engines and trains upon the appellant's private property; and this would seem to be accepted law by the large weight of authority. The mere user of such a path for foot passage, without objection on the part of the company, cannot be construed into an invitation to so use it, and the use of such a perilous way of travel in the day time could hardly justify an expectation that any body could be so foolhardy as to attempt it at night, at which time the evidence is it was never used in that way.

A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be, and any one who travels upon such right of way, as a footway, and not for any business with the railroad, is a wrong-doer and a trespasser; and the mere acquiescence of the railroad company in such user does not give the right to use it, or create any obligation for especial protection. *Illinois Central R. Co. v. Godfrey*, 71 Ill. 500; s. c., 22 Am. Rep. 112. Whenever persons undertake to use the railroad in such case as a footway, they are supposed to

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do so with a full understanding of its dangers, and as assuming the risk of all its perils. 71 Ill. 500; *M'Laren v. Indianapolis & Vincennes R. Co.*, 8 Am. and Eng. R. Cas. 219; *Jeffersonville, Madison & Indianapolis R. Co. v. Goldsmith*, 47 Ind. 43; *Railroad Co. v. Houston*, 95 U. S. 702, and *Railroad Co. v. Jones*, 95 U. S. 442; 1 Thomp. Neg. 453, 459; *Morrissey v. Eastern Railroad Co.*, 126 Mass. 377; s. c., 30 Am. Rep. 686. In *Maenner v. Carroll*, 46 Md. 212, which was a suit for injury received by falling into an excavation which had been dug on the private property of the defendant, over which persons were in the habit of passing, but which was not a public highway, this court declared the same principle as controlling, and adopted the language of the court in *Hounsell v. Smyth*, 7 C. B. (N. S.) 731, that in such case, "one who uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and it may be perils." *Binks v. South Yorkshire Railway & River Dun Co.*, 3 B. & S. 244; *Bolch v. Smith*, 7 H. & N. 736, and *Gautiel v. Egerton*, L. R., 2 C. P. 371, are cited in support of the law thus indorsed.

Inasmuch therefore as the presence of the deceased upon the road of the appellant at that point was a trespass, it would seem to be necessary to show some negligence, amounting to the omission of a general and imperative duty toward him notwithstanding, which ought to subject the appellant to liability in the action brought. This the appellees think they find in the violation of the city ordinance with respect to the step and look-outs provided for in it. To this appellant makes several replies; first, that there is an entire failure of proof to show that this omission tended in the slightest degree to bring about the fatal accident; or that its observance would have tended to prevent it; secondly, that the fact of the deceased being in so perilous a place, without any assignable reason, and that too as a trespasser at a most unreasonable hour, was such patently contributory negligence as entitled the case to be taken from the jury; and lastly, that the ordinance is so manifestly unreasonable that it cannot be complied with as engines are now constructed; the engine then used by the appellant being such as is now generally in use, and as the step did not exist, and could not be placed and a person could not sit where the ordinance provided, without imminent danger to life, the ordinance must be held inapplicable and void.

We are clearly of opinion that this case ought not to have been submitted to the jury. How the accident occurred and why, is shrouded in as much mystery as it was in *Northern Central Railway v. State*, 54 Md. 113, and *State v. Phil., Wilm. & Balt. R. Co.*, 60 Md. 555; and to hold the appellant liable under the circumstances of this case, simply because of the ordinance in question, and the alleged violation thereof, in having no step in front of the engine within twelve inches of the ground, and in having no man there to look out and guard against accidents, would be giving an unreasonable interpretation and operation to the ordinance in question. We do not find it necessary to consider or pass upon the question whether the ordinance has served its purpose, having been passed at a period when engines of different pattern were made and used, which have been superseded by others of such character that the ordinance cannot be complied with without endangering instead of protecting human life, and is consequently to be pronounced void because it is unreasonable. The question was very ably argued and involves principles of great moment which we do not think ought to be decided without more proof bearing on the subject than we have in this case. We have no difficulty however in holding that the provisions of that ordinance ought not to be applied to a case circumstanced as this is, and to a locality such as that, where this road runs and the accident occurred, confessedly is. The ordinance was intended for the protection of the people in the city who were compelled to pass along and cross streets where railroad cars were passing. It provides for the ringing of bells at the cross streets. It contemplated and was passed with reference to a condition of things which did not exist here. It presupposed that where the city was built up and populous the passing and repassing would be so considerable as to require protection to life by means of such an ordinance. Although the *locus in quo*, where this accident occurred, was technically within the corporate limits of the city, practically it was outside, as much so as the country adjoining the corporate limits, and perhaps more so than most of the adjacent territory. It has already been described. It was not treated as part of the city by its authorities. It had no streets. It was uninhabited and desolate. It was swampy and uneven. It was not lighted nor patrolled. And there was no need for either lights or watchmen. The railroad was running on its own private property crossing none of the city's streets at that

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point. Nobody was entitled of right to pass that way, and could not be expected to be passing at such an hour of the night. There being no reason or necessity for observing such precautions as those prescribed by the ordinance, in such a place, it would be giving it a most unreasonable construction and unnatural application to hold that an omission to observe its requirements, at such time and place, *per se*, and standing on that alone, gave a right of action to the appellee. This view is entirely sustained by authority and we refer to 1 Dill. Mun. Corp., § 31, and *Myers v. Chicago, Rock Island and Pacific Railroad Company*, 57 Iowa, 554, and authorities there cited. The facts bearing upon the ordinance and controlling the decision in *Myers'* case, 57 Iowa, are very similar to this case. Independent of the ordinance the case falls within the principles and ruling in *Burns'* case and *Bernard's* case already cited, and as we think the ordinance cannot be invoked to compel a verdict for the plaintiff, it is clear the prayer at the close of the case taking the case from the jury ought to have been granted. We are accordingly relieved from considering the other instructions.

Judgment reversed.

CONSOLIDATED GAS COMPANY V. MAYOR, ETC., OF BALTIMORE.

(100 Md. 588.)

Taxation — ordinance — 'machinery.'

Gaugometers and gas mains and pipes of a gas company are not part of its "machinery actually used in the manufacture" of gas.

BILL to restrain collection of a tax. The opinion states the case. The bill was dismissed below.

N. Penniman Bond and *Robert D. Morrison*, for appellant.

James L. McLane, for appellee.

ROBINSON, J. Ordinance No. 7, 1881, passed by the mayor and city council of Baltimore, in pursuance of the acts of 1880, chapters 187 and 235, provides, "that any mechanical tools or implements,

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whether worked by hand or by steam or other motive power, machinery, manufacturing apparatus or engines, owned by any individual, firm or corporation in said city and properly subject to valuation and taxation therein, which said tools, implements, machinery, apparatus or engines shall be actually employed and used in the business of manufacturing in said city" shall be exempt from taxation.

The appellant was incorporated under the laws of this State for the purpose of manufacturing illuminating gas in Baltimore city.

The question in this appeal is whether the gasometers and gas mains or pipes belonging to the company are, under the above ordinance, exempt from taxation? And this depends upon whether they constituted part of the machinery actually used by it in the manufacture of gas? — the language of the ordinance being "any machinery, etc., actually employed and used in the business of manufacturing."

The process of manufacturing gas is, according to the testimony, as follows: The coal is put in air-tight retorts and heated to a temperature sufficient to drive off the volatile matter, which in fact contains every thing to be found in illuminating gas, the residuum in the retort being coke. This volatile matter or gas then passes into a condenser of a lower temperature, to free it from the tar which is present with the gas; it then goes into what is called a scrubber, by which the ammonia is washed out in the form of ammoniacal liquor; thence it is drawn by an exhauster, driven by a steam engine, through purifiers over slacked lime, and thus freed of all impurities. It then passes through the station meters for the purpose of ascertaining the quantity produced; thence to the gasometer and then through the mains or service pipes to the house of the consumer.

The gasometer is a huge, air-tight reservoir for the storage of the gas thus produced and the pressure which is necessary to force the gas through the mains to the consumer. The pressure is generated by the exhauster, which forces the gas through the purifiers into the gasometer. The gasometer being automatic, it rises or falls according to the supply and consumption of gas, the pressure which is communicated to it by the exhauster being regulated and modified by what is called a governor inside of the gasometer.

The gas when it passes into the gasometer is ready for illumination, and all that is required to make it available for use is pres-

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sure sufficient to force it through the mains and pipes to the house of the consumer, then coming into contact with the oxygen in the air, it becomes, when lighted, an illuminating gas. This pressure is furnished, as we have said, by the exhauster, communicated to the gasometer and regulated according to the supply and consumption by the governor.

If this be so, then it is clear the gasometer performs no function whatever in the manufacture of the gas itself. It is used merely for the storage of the gas, and the pressure necessary for its distribution. We do not understand the decision in *Commonwealth v. Lowell Gas-light Co.*, 12 Allen, 75, to be in conflict with this view. The statute in that case provided, that whenever the market value of all the shares of the capital stock of a corporation shall exceed the value of its real estate and machinery, as returned by the assessors, such excess in value shall be liable to taxation. The question was, whether the commissioners appointed to ascertain and fix the value of the capital stock, and to deduct therefrom the real estate and machinery of a gas company, ought to have included in the valuation of the latter the gasometer and mains belonging to the company; and the court decided, in that sense, and for that purpose, that is, for the purpose of ascertaining the value of its real estate and machinery, the gasometer and mains must be considered as part of the machinery. Whether "machinery" as used in its broadest and most comprehensive sense includes a gasometer, it is unnecessary to decide in this case. Be that as it may, it is not part of the machinery actually used and employed in the manufacture of the gas.

For the same reasons the mains are not part of the manufacturing plant which is exempted by the city ordinance from taxation. They are merely pipes used for the purpose of distributing the gas and pressure to the point of illumination.

The question as to the power of the legislature to authorize the city authorities to pass an ordinance exempting the manufacturing plant from taxation was not argued in this case, and we are not to be understood as expressing any opinion in regard to this question.

For these reasons the decree will be affirmed.

Decree affirmed.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

TIMMERMAN V. DEVER.

(33 Mich. 34.)

Contract — in restraint of trade — “vicinity.”

An agreement by a physician not to practice in a certain city and “vicinity” excludes from territory within ten miles of the city. (*See note, p. 242.*)

INJUNCTION. The head-note states the case. The plaintiff had judgment below.

Clement Smith, for complainant.

Knappen & Van Arman, for defendant.

SHERWOOD, J. The parties in this case are both practicing physicians residing in the city of Hastings, and carrying on the business of their profession. On the fourth day of June, 1881, the defendant entered into the following contract with the complainant:

“In consideration of the sum of \$500, to me in hand paid this fourth day of June, A. D. 1881, by Frank R. Timmerman, M. D., the receipt whereof is hereby acknowledged and confessed, I agree as follows: To remain in the city of Hastings and vicinity, in the

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active practice of medicine with said Timmerman, for a period not exceeding six months from this date, and to divide equally the receipts of said practice with him. At the end of six months from this date I agree to relinquish and yield up to him my practice, and remove from said city and vicinity, and refrain from practicing medicine in said city and vicinity, after said six months, for at least the term of five years immediately succeeding said six months, and I reserve the right to remove from said city and give up said practice as aforesaid any time after this date and before said six months shall expire."

By agreement of the parties the time for defendant to quit practice and leave said city was extended until the first day of April, 1882.

Complainant's bill avers that the said defendant, instead of complying with his agreement to quit practice in the city of Hastings and vicinity thus made with the complainant, when said first day of April arrived absolutely refused so to do, and from that time to the present has continued to practice his profession in Hastings and vicinity, and avers his intention to continue his practice there.

The answer admits defendant's continuance in practice at Hastings, and avers his right to continue by reason of certain understandings and dealings between the parties had subsequent to the making of the contract. The case was heard at the Barry Circuit on pleadings and proofs, and the Circuit judge made a decree in accordance with the prayer of complainant's bill.

Upon an examination of the record we think the conclusion of the Circuit judge was correct. It very clearly shows a failure of the defendant to comply with his written agreement with the complainant, which non-compliance, according to the testimony of defendant himself, could scarcely fail to be an injury to complainant.

A discussion of the testimony is unnecessary, and could serve no useful purpose. It is sufficient to say the equity of the case is clearly shown to be with complainant, and but one thing requires further notice — the decree restrains the defendant from practicing his profession "in the city of Hastings and vicinity." This clause of the decree is somewhat indefinite as to the extent of territory to which it applies, and may give rise to further misunderstanding between the parties. For the purpose of obviating any difficulty of this kind, the decree made by the Circuit judge should be so

modified as to make certain the limits of its operation. Of course the extent of territory included in the term "vicinity of the city" must necessarily depend in a great measure upon the size of the city, its location and particular surroundings; and under all the circumstances as they appear upon this record I think the territory surrounding the city for the distance of ten miles from its corporate boundaries a reasonable limitation, and one which may be safely regarded as within the contemplation of the parties when they made their contract.

The decree at the Circuit Court should be modified accordingly and thus modified must be affirmed with costs.

CAMPBELL and COOLEY, JJ., concurred.

GRAVES, C. J. I agree with the court below that the case established by complainant entitled him to relief, and I also agree that the proper mode of relief is by injunction. But I think the decree ought to be more precise. It pursues the wording of the agreement, that defendant should forbear business in the city of Hastings and "vicinity," and fails to prescribe what territory the parties understood by this expression. They meant by it to identify the space from which the defendant was to be excluded, but they did not use it as amounting to a definite description.

The word itself is entirely indefinite as a term of description of the bounds of the territory, and it fails to fix in such manner as it should for the purpose of an injunction the particular limits which the defendant is not to pass. The defendant is entitled to be informed, on the face of the injunction, where he is not to act under peril of attachment, and it ought not to be left as a matter of speculation or conjecture.

I am inclined to think that the sense of the parties is substantially answered by regarding the city limits and a space extending ten miles on all sides therefrom as the area from which the defendant was to be excluded, and I think the decree should be so varied as to correspond with this view, and in all other respects affirmed.

NOTE BY THE REPORTER.— See *Cook v. Johnson* (47 Conn. 175), 36 Am. Rep. 64; *Smalley v. Greene* (52 Iowa, 241), 35 Am. Rep. 267; 33 Eng. R. 463

In *Sander v. Hoffman*, 64 N. Y. 248, it was held that "where A. sold out the stock and good will of a retail business to B., covenanting not to engage in or carry on the same business within certain limits, it was not necessary, in order to establish a breach of the covenant, to show that A. had solicited custom

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within the prescribed limits; if he having established himself in the same business outside of the district, systematically and for profit, to an extent to constitute the carrying on of a business sent to the houses of customers within the district, received orders and delivered goods, this was a breach of the covenant, although it be done at the request of the customers and without his solicitation. If occasionally to oblige an old customer A. sold to him, this was not a breach. See 27 Alb. L. J., 24.

PIQUEGNO V. CHICAGO AND GRAND TRUNK RAILWAY COMPANY.

(58 Mich. 40.)

Master and servant — negligence — ice near railway.

A railway brakeman, suddenly called to supper, by the conductor, slipped on snow and ice accumulated near the station platform, and was injured. *Held*, that the company was not liable

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

Atkinson & Stevenson, for appellant.

E. W. Meddaugh and Wm. T. Mitchell, for appellee.

COOLEY, J. Action for injury to the person. The declaration alleges that on February 8, 1881, plaintiff was in the employ of defendant as a brakeman on a freight train running from Port Huron to Valparaiso, Indiana, through the city of Flint, and that defendant "did not carefully, skillfully and without negligence run its trains over said road, and did not keep such road and all its appurtenances in good, safe and proper condition, and did not keep its station grounds and platforms, at the city of Flint aforesaid, free from ice, snow and other matter dangerous to the safety of persons employed on said road, and did not on the day aforesaid and at the place aforesaid provide its engine, then used in making up trains and moving the van which the plaintiff was at work upon, with a skillful and competent engineer, but in all the matters aforesaid neglected its duty in the premises and operated its engine by a fireman who had neither skill, experience nor capacity for such work, and suffered its station grounds, track and platform to become

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covered with slippery ice and snow, and the space from the track to the platform was obstructed with dangerous snow-heaps so that the whole track, platform and premises, at the place aforesaid, were in an unsafe and dangerous condition through the negligence of the said defendant, by means whereof the plaintiff, while performing his duties as brakeman with all due care and diligence on his part, and in consequence of such negligence and default of the defendant, was thrown with great force and violence from the van upon which he was riding, on to the platform aforesaid, and by reason of the ice and snow thereon was carried and thrown from such platform over the ice and snow bank aforesaid against the defendant's track, on the line of its road, and by reason of the negligence and unskillfulness of the fireman aforesaid, while so lying near the track, was run upon by an engine of the defendant, and his left arm broken and mangled," etc.

On the trial the plaintiff showed that at the time and place named his arm was run upon and broken and mangled by an engine as alleged, but there was no evidence whatever that any negligence or unskillfulness in the fireman was in any manner concerned in the injury, and it was testified by himself that he voluntarily jumped from the van, and was not thrown from it as he had alleged. His account of the accident is in substance this: The train was manned by one Strickland as conductor and one Flynn and himself as brakemen. It was at Flint, where it had just arrived from Battle Creek. He set the brakes and stopped the train, and then went into the van to put away the flags and get ready for supper. Within four or five minutes the conductor came in and told them they had to go right back to Battle Creek, and they must hurry as quick as they could and get supper. In a minute or two they coupled on behind the caboose and turned away out on the switch, backing toward the west switch near Saginaw street. They then started and went east toward the station. Plaintiff then had his clothes off preparing for supper. The conductor hallooed to him to get off and get his supper, and Flynn said they had better go or they would get left, so he hurried on his clothes, and as he proceeds to say:

"I got off and ran probably two or three steps, probably three or four—I don't know how much exactly—and I struck some ice that had been left there from where they had probably been cleaning, and I slipped toward the track and glanced off slanting toward

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the rail. When I struck the old ice and snow I laid on my back, and something struck my left shoulder; I couldn't say whether the box of the journal or the cylinder of the engine, and shoved me probably eight feet forward, till my feet reached where it was a little low, and I couldn't hold myself any longer, and my back lay on a bank of snow slanting toward the track, and I slid down between the two, and laid in that shape to protect myself as well as I could. My left arm was run over. I got up after the engine passed, and looked on the ground, and I saw from where I first slipped that there was no ice — probably might have been a little ice — and saw where I slipped, probably a foot and a half or two feet, where there was some old snow left there, the cause of my slipping. This was on the platform. The size of the piece of old snow or ice on the platform was three or four feet wide, and may be the length of eight feet. 'It was not where I first struck the platform. If I hadn't struck the old ice I would have been all right. As I ran ahead, not being able to stop short, I struck this piece of old ice and slipped off from the platform, slanting toward the track. The bank of old ice and snow piled up along the way, more or less, nearly level with the platform, slanting toward the track from the platform, caused me to slide down to the rail. This occurred a little after five o'clock; it wasn't dark, but cloudy."

Thus being the statement of the plaintiff himself, we may assume was the strongest statement of negligence against the defendant that could truthfully have been made. The Circuit judge was of opinion that it made out no cause of action and so instructed the jury. The only question before us is whether there was error in this conclusion.

The gravamen of the plaintiff's complaint is that the defendant has been guilty of negligence to his injury. The only negligence which the evidence tends to establish consists in the failure to keep the ground along by its track, at the place where the injury occurred, free from snow and ice. This, it is said, it was the duty of the railroad company to do, and it should have been made by the company the duty of some of its servants to look after it and see that it was done. Whether provision was made for this does not appear. If it was, and the neglect of duty was that of the servant rather than that of the company, it is conceded that the plaintiff is not entitled to recover (*Davis v. Detroit & Milwaukee R. Co.*, 20 Mich. 105); but the plaintiff contends that this duty,

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like the duty to provide suitable and safe machinery, is one the company cannot delegate, and it is responsible for any injurious consequences resulting from the neglect to perform it. It becomes necessary therefore to determine whether any such duty is made out.

It is to be observed that no complaint is made of the track being unsafe or out of order; what is said is, that alongside the track where the brakeman had occasion to alight, and where the plaintiff did alight, the footing was unsafe by reason of the snow and ice not having been removed from it. This place was in the vicinity of the station, but it might have been anywhere else on the line; for the occasions for a brakeman to leave his train are occurring constantly at considerable distances from the station on either side, as trains are loading, making up or passing each other, and also occasionally at places remote from stations; so that an accident like that which happened to this plaintiff might have occurred from a like cause at any point on the line. If therefore it is negligence in the defendant to fail to provide against the possibility of such an accident at one point on its line, it is negligence to fail in the like provision at any other point, though the degree of negligence will doubtless vary with the proximity to the station where the occasions for leaving the train will be most numerous. It seems to result that the defendant at its peril must keep the ground near its track free from snow and ice for its entire length. It is also to be observed that these substances are not the only ones that might cause a similar accident. A stick, a stone, a piece of baggage or freight lying near the track might in like manner cause a brakeman to stumble and fall, and the company at its peril must provide against the likelihood of such a casualty. So stringent a rule has never been applied to railroad companies, nor could it be without making them insurers against a species of accident which could seldom occur without carelessness on the part of the person injured.

It was said on the argument that the plaintiff was "commanded" to jump from the car, and that this, under the circumstances, was an improper command and was the cause of the injury. The suggestion has no force. The plaintiff was called to his supper under circumstances implying haste; but there was no command to jump from the train, and the plaintiff determined for himself his action in that regard. If a farmer were to call to his hired man to drive mischievous cattle away, and in hastening to do so the man should

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stumble upon an obstruction and injure himself, it might with the same reason be said that the "command" caused the injury, as to say so in this instance. There was nothing in the call to supper that was either negligent or improper, or from which the conductor had any reason to anticipate injurious consequences. It was not necessary therefore to consider what would have been the rule had the plaintiff been acting in obedience to an improper command.

The question which the record presents is, not whether this railroad company exercised the highest possible care; very few employers do that, whether they be railroad companies or master mechanics, or manufacturers or farmers; and the law does not require it, and it may be added that nobody expects it. Whoever engages in any service takes upon himself the ordinary risks of the employment. This is familiar law, and there is nothing in this case to make it in any way exceptional so far as the application of the rule is concerned. The cases of *Fort Wayne, etc., R. Co. v. Gildersleeve*, 33 Mich. 133; *Mich. Cent. R. Co. v. Smithson*, 45 Mich. 219; *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466; and *Batterson v. Chicago & G. T. Ry. Co.*, 49 Mich. 184, have covered this case so completely that nothing remains to be said by us upon it.

The fact that the planking or platform extended as far out as where the accident occurred does not appear to be one of any importance in the case. The accident occurred from running along upon the icy ground near the cars; and the liability to be injured was neither increased nor diminished by the ice extending somewhat over the planking.

The judgment must be affirmed with costs.

The other justices concurred.

 REED V. REED.

(32 Mich. 117.)

Marriage — divorce in another State — laches.

A temporary residence in another State for the mere purpose of getting a divorce does not give jurisdiction, but acquiescence for eighteen years is fatal to the wife's assertion of claim for support.

BILL for support of wife. The opinion states the case. The plaintiff had judgment below.

E. G. Stevenson, John Atkinson, and Isaac Marston, for complainant.

Frank Whipple, Harris & Vance, and C. A. Kent, for defendant.

COOLEY, J. Suit in equity to compel the defendant to furnish support to the complainant, who claims to be his wife. It is instituted under the act of 1873, which authorizes such a suit when the husband, without good and sufficient cause, shall desert his wife, or being of sufficient ability to support her, shall refuse or neglect to properly provide for and suitably maintain her. 1 Sess. L. 1873, p. 203. [How. St., § 6291.]

Most of the material facts in the case are not in dispute. The parties were married in Canada in the year 1850. The defendant was by trade a currier, and neither he nor his wife had property. He worked at his trade three or four years, and then began privately to read medical books. In 1857 he went to Terre Haute, Indiana, where he held himself out as a physician for about a year, but meeting with little success, went back to Canada, locating at a place called Madoc. In 1861 he moved to Port Huron in this State, and there the parties lived together as husband and wife until December, 1861, when complainant separated from her husband, and they have not lived together since. Three children, two boys and a girl, had been born to the parties, and the mother took the girl when she left. The father provided for the separate board of the boys for a time, but in the course of the next year they went to their mother, and remained with her until they came of age. The daughter has always lived with her mother, and for more than ten years has been blind and helpless. One of the sons is dead; the other is married and has a family. Defendant contributed to the support of his wife and children for three or four years after separation, but the parties disagree as to the extent of the aid furnished. In the fall of 1865 defendant went to Cincinnati where he took a course of medical lectures.

The immediate occasion for complainant leaving defendant was a charge she brought against him of adultery with one Mrs. Woodcock. In the summer of 1864 she filed a bill for a divorce on this

ground, and proceedings were had in the case for two years or so, but it never was brought to a hearing. In January, 1867, defendant filed a bill against his wife for a divorce on the ground of desertion. Meantime complainant had another ground of complaint against him, for alleged improper intimacy with a Mrs. Jones. When he filed his bill for divorce, complainant immediately took steps to have him arrested for failure to support his family, and this coming to his knowledge he secretly left Port Huron, going first to Canada, then to Toledo, and from there to Terre Haute, where he again offered his services to the public as a physician.

It appears by the testimony on both sides that defendant had had no thought of changing his residence up to the time of his leaving Port Huron, and that when he left the sole purpose was to avoid the service of process. He took pains that a knowledge of his whereabouts should not come to his wife, and he had goods which were sent to him from Port Huron billed to Toledo and from there reshipped, that the direction at Port Huron might not disclose his place of stay. After reaching Terre Haute he was advised that if he would stay there a year he could get a divorce, and he therefore remained until the year was up, and then filed his bill. In the meantime however he had had a friend approach his wife to ascertain if their controversies could be settled so that he could go back in peace, but his overtures were unsuccessful.

The cause assigned for divorce in the Indiana bill was desertion. Summons upon this bill was issued February 25, 1868, and returned ~~non est~~ the same day. Two weeks later a notice was filed with the clerk of the Indiana court that the plaintiff in that cause would take the testimony of witnesses at a law office specified in Port Huron on April 2, 1868, between the hours of eight in the morning and six in the afternoon. Pursuant to this notice, which it is manifest it was not intended the party concerned would ever see, the testimony of the plaintiff's legal adviser at Port Huron was taken, and this so completely made out the plaintiff's case, that as he ingenuously informs us, his Terre Haute counsel told him it was strong enough "to divorce half the women in Indiana." Probably by this was meant that by a like secret process a case could be made out against half the married couples in any community; and very likely that would be true. On filing this testimony and proving in open court that he had his residence in Terre Haute, the plaintiff was awarded his divorce. The proof of residence was

made by some woman he had seen at a boarding-house, but with whom he professed to have only a casual acquaintance. The decree purporting to grant divorce bears date April 28, 1868. The wife had no notice or knowledge of the Indiana proceedings until after their conclusion, and the only public notice which was given was published in a Terre Haute newspaper for three weeks, commencing February 26, 1868.

In a little over two months from the time he procured his Indiana divorce this defendant was practicing medicine as a resident of Port Huron again, and nineteen days after his arrival in that city he had gone through the ceremony of marriage with Mrs. Jones, though if his evidence is true no communication whatever had passed between him and her from the time of his clandestine departure from Port Huron until his return. After returning he gave no aid to complainant or to their blind and helpless daughter. The present suit was begun November 29, 1881, and the decree in it awards to complainant an annual allowance of \$365. The sum named is sufficiently moderate, if under the circumstances any sum at all should be awarded.

The defendant appeals and relies for a reversal of the decree upon the proposition that at the time the suit was instituted the complainant was not his wife; the marriage bonds between them having been dissolved by the Indiana divorce. "Full faith and credit," it is said, is required to be given to the record of this divorce by the express provision of the Federal Constitution (Art. IV., § 1); and it is not competent in a collateral proceeding to assail it.

It is true that the Constitution of the United States requires full faith and credit to be given in every State to the records and judicial proceedings of other States; but this requirement does not extend to the giving validity to those proceedings which in themselves are mere nullities. It is implied in judicial proceedings that the court, assuming to act and to render judgment, should have had competent authority to do so in the particular case; and when this authority is wanting, whatever is done is not judicial. It cannot therefore be within the protection of the Federal Constitution. And if the record by its recitals makes a *prima facie* case of jurisdiction, no one in another State or country is concluded thereby, but he may show what the real fact was and thus disprove the authority for making such a record. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light Co.*, 19 Wall. 58; *Bartlet v. Knight*,

Reed v. Reed.

1 Mass. 401 ; s. c., 2 Am. Dec. 36 ; *Shumway v. Stillman*, 4 Cow. 292 ; s. c., 15 Am. Dec. 374 ; *Thompson v. Emmert*, 15 Ill. 416 ; *Marz v. Fore*, 51 Mo. 69 ; s. c., 11 Am. Rep. 432 ; *People v. Dawell*, 25 Mich. 247 ; s. c., 12 Am. Rep. 260 ; *Elder v. Reel*, 62 Penn. St. 308 ; s. c., 1 Am. Rep. 414 ; *Pennywit v. Foote*, 27 Ohio St. 600 ; s. c., 22 Am. Rep. 340 ; *Gilman v. Gilman*, 126 Mass. 26 ; s. c., 30 Am. Rep. 646 ; *Bowler v. Huston*, 30 Gratt. 266 ; s. c., 32 Am. Rep. 673 ; *Eaton v. Hastly*, 6 Neb. 419 ; s. c., 29 Am. Rep. 365.

It may be assumed that the record of the Indiana court imported a case of jurisdiction, but this was because the defendant in this case imposed upon the court by a false assertion of residence and induced it by that assertion to make orders, and finally to enter a decree which it would not have made or entered had the facts been known. That court could have no authority to dissolve the bonds of matrimony between citizens of Michigan ; for the subject is one to which the laws of Indiana could not possibly extend, and do not assume to extend. The laws of that State authorize certain of its courts to grant divorces for specified causes on the application of actual residents of the State ; but a person is not such a resident who is in the State merely for the purposes of the divorce, as it is manifest that this defendant was during his last sojourn in Terre Haute. He left Port Huron not because of any purpose to abandon his residence there, but to avoid the service of process, and he remained in Terre Haute after reaching there because he was told that after a year's stay he might obtain a divorce. The proceedings in the Indiana court we need not comment upon further than to remark that when it is known that knowledge of them was kept from this complainant, though the pretense of giving notice was publicly made, and that the evidence was secretly taken in Port Huron, where it was known complainant had remained, it becomes at once apparent that the decree which the court was deceived into making was a mere travesty of justice. Had notice of the suit been given to the wife in Michigan she would have been under no obligation to give heed to it (*Scott v. Noble*, 72 Penn. St. 115 ; *Pennoyer v. Neff*, 95 U. S. 714) ; but the notice might have been some indication of a willingness to allow her to defend her rights ; while the course actually taken conclusively shows that it was never intended she should have the day in court which belongs to every one of common right, and which every civilized State assures to its people.

A more difficult objection for the complainant to overcome is that which arises upon the long delay to make claim to support. The Indiana divorce, it is seen, was obtained in 1868; this suit was instituted in 1881. Here is delay and apparent acquiescence in the fraudulent proceedings for thirteen years, and the bill assigns no reason for this whatever. But even this does not fully present the laches with which complainant is chargeable. It appeared from the charges and counter-charges that she withdrew from her husband in 1863, eighteen years before this bill was filed, and that her remaining apart from him after that time was against his will and in disregard of his repeated requests that she would return to him. A suit for support under such circumstances necessarily brings in question the justification for the original separation, and would require an investigation into the facts attending it. It could not be expected that an investigation after such a lapse of time could be any thing else than imperfect, uncertain and unsatisfactory, and the laches has been so gross that the court may well refuse to enter upon it. What is said in *Compo v. Iron Mining Co.*, 50 Mich. 578, 595, is entirely applicable to this case, and the following cases, in which relief was refused for long delay in cases of matrimonial offenses, may be considered even more directly in point: *Guest v. Shipley*, 2 Hagg. 321; *Matthews v. Matthews*, 1 Sw. & Trist. 500; *Same v. Same*, 3 Sw. & Trist. 161; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Valleau v. Valleau*, 6 Paige, 207; *Fellows v. Fellows*, 8 N. H. 160; *Whittington v. Whittington*, 2 Dev. & Bat. 64; *Rawdon v. Rawdon*, 28 Ala. 565; *Castleden v. Castleden*, 9 H. L. Cas. 186; *Peipho v. Peipho*, 88 Ill. 438.

The conclusion must be that the decree must be reversed and the bill dismissed.

GRAVES, C. J., and SHERWOOD, J., concurred.

CAMPBELL, J. I concur in so much of the opinion as reverses for laches.

Spalding v. Archibald.

SPALDING V. ARCHIBALD.

(33 Mich. 365.)

Statute of frauds — void sale valid as license.

An oral sale of stumpage, void within the statute of frauds, may be valid as a license.*

REPLEVIN. The opinion states the case. The defendant had judgment below.

B. J. Brown, for appellant.

B. C. Cook and *H. O. Fairchild*, for appellee.

COOLEY, J. Replevin for eleven hundred cedar telegraph poles. The plaintiff in the years 1880 and 1881 was engaged in the business of getting out ties, posts and telegraph poles from lands belonging to himself and others in the vicinity of Spalding, in Menominee county. The poles in question were cut in the winter of 1880-81, and as plaintiff claimed, were delivered to him by one Leon Lacroix, under a verbal contract, whereby Lacroix had engaged to cut poles for plaintiff on lands owned by him on section six in township thirty-eight north of range twenty-six west. The poles however were not all cut on section six, but some were cut on the southwest quarter of section eight and some on the south half of the northwest quarter of section eight. The defendant Archibald, on the other hand, claimed that eight hundred of the poles were cut by Lacroix from the northwest quarter of section eight, and that the remainder were bought by Lacroix from one Poquin, who had cut them on some part of section eight. It is not disputed that all the lands from which poles were taken belonged to the plaintiff.

Lacroix was a witness for defendant and testified that he got out 800 of the poles on the northwest quarter of section eight, and that he bought the others of Poquin. He was permitted to state, under objection by the plaintiff, that he went to Spalding to see if he had cedar land for sale, or jobs to give; that Spalding said he did not know whether there was cedar on the land or not, but told him

* See *Purner v. Percy* (40 Md. 212), 17 Am. Rep. 591.

to go to Hagerson and what Hagerson said would be all right ; that he did go to Hagerson, who sent one Allen with him to look at a forty on section eight ; that Allen made his report to the office, and witness then went to Hagerson and told him he had seen the cedar and would take it at a price which had been talked about, and Hagerson said " all right ; " that witness had dealings with Spalding and had a pass-book, and Hagerson took the pass-book and made an entry, as follows : " Dec. 30, 1879. Stumpage on N. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 8, \$85." The Allen mentioned was foreman for plaintiff and showed people land when they wanted to buy.

Similar evidence was given of a purchase by Poquin of cedar trees on another part of section eight, but it was testified by Poquin that after he had cut for a time Hagerson told him to stop cutting, because the trees cut were in the way of other persons who were using a wood road. Poquin interpreted this as leaving him at liberty to cut, provided he did not obstruct the road, and he continued to do so, and sold what he cut to defendant. He cut ties on the same land at the same time and delivered them to the railroad company with directions to pay the price to Spalding.

Plaintiff's objection to all this evidence was that it tended to show a parol sale of an interest in lands. Such a sale, it was truly said, would be void under the statute of frauds. *Russell v. Myers*, 32 Mich. 522 ; *Putney v. Day*, 6 N. H. 430 ; s. c., 10 Am. Dec. 470 ; *Owens v. Lewis*, 46 Ind. 488 ; s. c., 15 Am. Rep. 295, where numerous authorities are collected. This position is not disputed by the defendant.

But it does not follow, because a sale is void under the statute of frauds, the purchaser can derive no title under it. Such a sale is void only at the option of the parties concerned ; and if they elect to treat it as valid it may become effectual for all purposes. And commonly, even if not wholly affirmed, it will operate as a license which will protect the purchaser against liability for any thing done under it prior to any act of revocation.

A license very often assumes the form of a sale, and it only fails to become a sale because of not being put in legal form. If we believe the testimony of Lacroix and Poquin such was the case here ; they bargained for a purchase from Spalding with his agent Hagerson, but the subject of the bargain was an interest in lands, and to render it effectual a deed was necessary but was not given. The whole transaction was therefore invalid from the first, and either

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party might have refused to recognize or act upon it. If they had done so no rights could have sprung from the negotiations. But Lacroix and Poquin went on and cut the poles, without objection or protest, except as hereinbefore mentioned, and the question now is what rights were acquired by them, or what liabilities incurred thereby? Had they done the cutting under an oral permission given as a mere favor to them, or for the benefit of Spalding himself, the permission would have been a license which would have given them ample protection; but it was not the less a license by reason of having assumed the form of a sale and been paid for. The essence of the license is in the permission to do what was done; the purpose or consideration of the permission is commonly of no importance.

But the attempted sale was not restricted in its force to the protection of the parties from being held trespassers for what they may have done under it; for to the extent that trees were cut under it before revocation it took effect as a sale, and passed the title to the licensee, who thereby became purchaser under it. The permission to cut and remove must be understood as continuous until actually recalled; and as fast as the trees were severed from the realty by the cutting, the contract of sale attached to them as chattels, and the parties cutting were entitled to remove them as their own. This doctrine is abundantly affirmed in our own decisions: *Greeley v. Stilson*, 27 Mich. 157; *Haskell v. Ayres*, 35 Mich. 90; *Welmores v. Neuberger*, 44 Mich. 362; and is also generally recognized elsewhere, as a reference to a few of the leading cases will show. *Yale v. Seely*, 15 Vt. 221; *Clafin v. Carpenter*, 4 Met. 580; *Erskine v. Plummer*, 7 Me. 447; 22 Am. Dec. 216; *Pierrepoint v. Bernard*, 6 N. Y. 279; *Owens v. Lewis*, 46 Ind. 488; s. c., 15 Am. Rep. 295. It was suggested on the part of the plaintiff that to give the transaction this effect it should be shown that he had actual knowledge that the cutting was proceeding; but this was not important; he was bound to assume his consent would be acted upon.

The plaintiff concedes that whatever authority Poquin had to cut poles was revoked; and we have seen how he construed what was said to him on that subject. Whether he was right or wrong in this construction was a question for the jury. *McKenzie v. Sykes*, 47 Mich. 294; but the plaintiff did not request that it be specifically submitted to the jury, and there is no ruling of the Circuit judge in respect to it for us to review.

It is, as we think, of no importance in the case that the invalid sale was made by Hagerson instead of by Spalding in person. Had Hagerson, without authority to sell interests in lands, assumed to grant such licenses at his own instance, they would have been void even as licenses; but here the case which the jury believed was that the parties who bargained with Hagerson were sent to him for that purpose by Spalding himself; and if that was the case the licenses granted stand on no different footing than if Spalding in person had given them.

Some other points are made in the brief for the plaintiff, which we have considered and do not think are well taken. They rest so exclusively upon the peculiar facts of the case that their discussion could do nothing toward settling any general principle, and is therefore unimportant.

We find no error in the record, and the judgment must be affirmed with costs.

Judgment affirmed.

The other judges concurred.

HOFFER V. HODGE.

(88 Mich. 573.)

Master and servant — hiring of team and driver.

Where the hirer of a team with a driver agrees with the owner that he will temporarily furnish his own driver, the hirer is bound to ordinary care toward the owner, and the driver is his servant.

ACTION for value of a horse, etc. The opinion states the case. The plaintiff had judgment below.

T. L. Chadbourne and Lillibridge & Latham, for appellant.

Chandler & Grant, for appellee.

CHAMPLIN, J. The plaintiff brought an action against the defendant to recover the value of a horse and harness and damages to a

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wagon, under the following circumstances: On the 26th day of September, 1882, and for some time prior thereto, the defendant was the owner of and operated a foundry and machine shop, situated on the shore of Portage lake in the county of Houghton. Plaintiff was under a contract with defendant to do certain team work for him at his foundry, in the execution of which he employed his horse, harness and wagon. He also furnished a teamster to drive the horse. This contract to do teaming was from month to month. On the 26th of September, 1882, his teamster being sick, he took his horse and wagon to the office of defendant and informed defendant's agent of the fact of his teamster's illness. The plaintiff testifies that Mayworm, the defendant's agent, told him to leave the horse there and they would take care of him; that probably they would not use him, but if they did, they would find a driver themselves. Mr. Mayworm says he told the plaintiff that he could drive the horse up and if they found they had to do any driving they could, as he suggested, let one of their own men go along and do the driving; they could accommodate him to that extent.

Having occasion to use the horse to draw some castings, the agent took an employee from the shop and directed him to drive the horse. The testimony shows that this person was incompetent to have the care and management of a horse, that he was inexperienced in driving horses, and so informed the agent, Mayworm, at the time. He says he told Mr. Mayworm that he had never driven a horse but once before. The record discloses the fact that the castings to be hauled were situated on the dock and within a few feet of the waters of the lake; that to receive the load it was necessary to back the horse and wagon within about three feet of the water; that there was no protection along the margin of the dock to prevent the horse and wagon from being backed into the lake. The person selected by defendant's agent proceeded to do the work designated, and having hauled one load, in placing his wagon in position for another backed the horse off from the dock into the lake and the horse was drowned.

There was a verdict and judgment for the plaintiff in the court below and defendant assigns error here. There are twenty-two assignments of error, seventeen relating to errors in the admission or exclusion of testimony, and five to the action of the court in charging the jury.

We perceive no error either in the admission or exclusion of testimony.

The main contention aside from the question of negligence, was whether under the facts above stated, the driver in charge of the horse at the time of the accident was the servant of the plaintiff or that of the defendant.

The defendant's position is that the plaintiff, being himself employed under a contract to do the work in the execution of which the accident happened, the person selected by the defendant was under the circumstances the servant of the plaintiff; that in the light of the contract it was merely an act of accommodation to plaintiff, and that defendant assumed no risk or liability in respect thereto.

We do not think this is a correct view of the law. It is true that defendant was under no obligation to furnish a driver for plaintiff or to assist him in any manner in carrying out his contract with him. But when the defendant received the horse and wagon in his possession and put them to use in his business, it was incumbent upon him to use them with ordinary care and to furnish a competent person as driver. And we think that under the facts of this case the driver employed at the time of the accident was clearly the servant of the defendant. He was subject to his direction and control, could be withdrawn or not from that duty at his option, and his possession of the property in question must be deemed the possession of the defendant while engaged in the defendant's business.

Complaint is made that the judge charged the jury that the degree of care required of defendant Hodge, or his authorized agent in this business, was ordinary care, caution and prudence; that he was held to that degree of care, caution and prudence that an average man of good sense exercises about his own affairs; and counsel for defendant insists that the court should have charged the jury that slight care was all that was required of the defendant upon the plaintiff's own theory of the case.

The charge of the court was correct. The bailment being beneficial to both parties, the duty of the defendant in keeping the property was substantially the same as in a bailment for hire. He was bound to keep and preserve the property with ordinary care — that care which a prudent man ordinarily takes of his own property. This duty called upon him to select a careful and competent driver if he saw fit to employ the property in his own use.

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We think the case was fairly submitted to the jury by the court, and we find no error in his rulings, and the judgment is affirmed with costs.

Judgment affirmed.

The other justices concurred.

WOOD V. DETROIT CITY STREET RAILWAY COMPANY.

(88 Mich 408.)

Negligence — contributory — driving on street railway.

It is gross negligence to drive upon a street railway track without looking around, and it is unlawful to drive along such track and willfully obstruct the cars.*

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

John G. Hawley, for appellant.

John C. Donnelly, for appellee.

COOLEY, C. J. This is an action for personal injuries alleged to have been caused by the driver of the defendant negligently causing his car to run against the vehicle of the plaintiff, as he was driving along one of the streets of Detroit.

The plaintiff was sworn as a witness in his own behalf, and he also called the driver as his witness. After hearing both stories the Circuit judge ruled that there was nothing to go to the jury, and directed a verdict for the defendant. The plaintiff brings error.

According to the plaintiff's story he was driving a one-horse vehicle along the street on one side of the defendant's tracks when he encountered obstructions and turned toward the tracks so that his right-hand wheels were over the rails. He did not look behind him to see if a car was coming until he felt something strike the rear wheel. He then looked around and saw it was the street car, and the driver, as he says, "motioned me with one hand to go on

* See *Spaulding v. Jarvis*, 82 Hun, 621; *Brown v. Broadway etc., R. Co.*, 50 N. Y. Super. 106

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or he would knock a wheel off me. I laughed at him and said, 'You better not knock off more than one or two of them or somebody will have to pay for them.' He kept on motioning to get out of the way. I told him I could not get over those wagons, and I was not going to try, but I would get out of his way just as soon as ever I could. I kept on. There was a number of wagons standing on that side of the street, loaded with brick, and three or four or five of them with the rear ends of the wagon out on the street further than the fore end, which brought the rear end of these wagons very near the car track, so that I had to get with the wheels on the right-hand side of my wagon partially on to the track, and some places it got off the track, and some places I had to get right out pretty well over the track."

Up to this point the plaintiff was not only in fault, but he was the only party in fault. He had driven upon the track in front of an approaching car without looking around until the car had come in collision with his vehicle. This was gross carelessness on his part. But further on his evidence shows that the other side of the track was entirely unobstructed, and that there was nothing to prevent his crossing at once and allowing the street car to proceed on its way. The car had come to a stand-still on the first collision, and the plaintiff's conduct in maintaining his ground and responding to the driver's request that he should get out of the way by a laugh and a threat, was not only a wrong to the defendant but also to any persons who might then be riding in the car or awaiting its coming.

But the plaintiff further testified that as he was leaving the track the driver called out: "God damn you, I can smash you anyhow," and that he let go the brake and the car almost instantly struck the plaintiff's wagon and threw it over, inflicted the injury complained of. The inference from this might be that the driver purposely and in the anger excited by their altercation, ran his car against the plaintiff's wagon, and if the action had been brought for the trespass, it might become necessary to decide whether under cases like *Wright v. Wilcox*, 19 Wend. 343, the defendant would be responsible. In that case it was decided that where the servant willfully drove his master's conveyance over a third person and injured him, the trespass was that of the servant for which the master was not liable. The case was followed in *Richmond Turnpike Co. v. Vanderbill*, 1 Hill 480; s. c. in error, 2 N. Y. 479, where the master of a vessel had purposely run the vessel into another, and in *Illinois*

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Cent. R. Co. v. Downey, 18 Ill. 259, where the engineer upon a railroad purposely ran his engine over live stock. Also in *DeCamp v. Railroad Co.*, 12 Iowa, 348, and many other cases. The general principle that the master is not liable for his servant's trespasses is familiar, and was recognized by this court in *Chicago etc., Ry. Co. v. Bayfield*, 37 Mich. 205. And if it were important to determine whether the injury was one purposely inflicted and not one resulting from carelessness, the question would no doubt be one to be submitted to the jury. *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 129; s. c., 21 Am. Rep. 597.

But this is an action in case, and the ground on which it is sought to charge the defendant is that its servants negligently drove the car against the plaintiff's vehicle. We are then to see whether, if negligence on the part of the driver is made out, or there is any evidence tending to prove it, the plaintiff himself, on his own evidence, does not appear to have been at least equally negligent. And we think he does. He knew very well he was in the driver's way, and he had had ample time and opportunity to get out of danger if so disposed. That he was not disposed to allow the car to go on until it suited his pleasure to do so, is quite apparent, and there is abundant reason in his evidence for believing that he was purposely annoying the driver and delaying the car. If so, he cannot complain of the consequences.

The driver's testimony is quite different from the plaintiff's. He testified that when he first signalled the plaintiff to get off the track, the plaintiff made no effort to do so. The driver told him to get off or he would be run into, and he replied, 'Run and be damned; he had as much right to the track as the driver had, and he would get off when he pleased.' He drove right along on the track, looking back and scolding the driver. Finally he turned off, and the car moved on, but he almost immediately turned again toward the track sufficiently to be struck by the car. If this evidence is true, the contributory negligence of the plaintiff was plain and very gross, and he must bear the consequences. Whether therefore we believe the plaintiff or the driver, the ruling of the Circuit judge was well warranted.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

DERWIN V. PARSONS.

(88 Mich. 435.)

Evidence — hallucinations — impeachment.

On the trial of a complaint for indecent assault upon a woman in disordered health, it is proper to show that such persons are subject to hallucinations, and to ask her if she had not made similar charges before, without mentioning the one in question; but not proper to ask her if she had not been undergoing medical treatment at a college in presence of a class, nor to show that the defendant had improperly approached the judge or been charged with buying votes.

ASSAULT and battery. The opinion states the case. The defendant had judgment below.

James H. Pound, for appellant.

Moore & Canfield, for appellee.

COOLEY, C. J. Action for assault and battery. The plaintiff was the sole witness to the facts upon which she relied for recovery. The defendant contradicted flatly the story told by the plaintiff, but he also claimed and put in evidence to show that the plaintiff was afflicted with a certain disease, and that women having that disease are likely to have hallucinations under which they imagine that assaults like the one complained of are made upon them.

The case was tried by the jury and judgment rendered for defendant. The plaintiff complains of a considerable number of rulings made by the trial judge on questions of admissibility of evidence, and the case has been fully and ably argued upon the errors assigned by her. We have considered them all and have reached the conclusion that while the judge might, and perhaps in some cases ought to have ruled differently, yet that no such error appears as would justify the reversal of the judgment.

The case was one which justified a good degree of liberality in the admission of evidence. The parties were directly opposed in their testimony, and the jury would be likely to accept the statement of the one who was best supported by the circumstances. The plaintiff was cross-examined at great length on her previous

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history, and seems to have been willing to make full explanations on most subjects. To questions whether she had not made charges similar in nature against two other persons objection was made, but we have no doubt it was proper to allow them, and also to prove the facts if she denied having made the charges. The probability that a woman who conducts herself properly will be frequently assaulted is very small, and every new complaint therefore tends to cast doubt upon those which preceded it. It was also proper to ask the plaintiff whether she did not within a few hours after the alleged offense tell a confidant of a similar case but make no mention of this; and then when she denied it, to allow her to be contradicted. The jury would be very likely to infer that an outrage just committed and not mentioned under such circumstances was not committed at all.

It was also proper, after it had been proved that plaintiff was afflicted with a particular disease, to show by experts that a considerable proportion of women thus diseased were liable to hallucinations respecting the conduct of men toward them. There was indeed no direct evidence that plaintiff was ever the victim of hallucinations; but nevertheless she might be without the fact being known; and so long as the main facts to which she testified were in dispute, the circumstance which might produce delusion was not without significance.

But upon this branch of the case a wrong was done to the plaintiff which we cannot pass without rebuke. She appears to be a woman without means, and she went for necessary medical treatment to the hospital of a medical college where she would be treated without charge. The reason for this gratuitous treatment is understood to be that the students attending the college have the benefit of such instruction as comes from actual attendance upon surgical operations and other treatment. To submit to treatment before a class of students must often be mortifying to a modest woman; but if she is poor there is nothing disgraceful in it, and it ought not to be the subject of controversy or comment elsewhere with a view to her annoyance. The public as well as the woman herself is interested in her having the attention and treatment her case requires, and she is to be commended for going for it, instead of being exposed to ridicule or to disparaging suggestions. Therefore in this case, after it had appeared that the woman had been treated by a competent physician, the question whether the treatment was not

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in presence of a class of medical students should never have been asked, or if asked, should have been promptly overruled. It could have had no purpose except to afford a ground for unfavorable inferences respecting her modesty; and these if unjust would subject the woman to a great cruelty when her only fault was her poverty.

In most such cases unfavorable inferences would unquestionably be unjust; and it would therefore be inexcusable to suggest them in any case without direct evidence rendering their justice probable.

We cannot believe however that the plaintiff's case was injured by this evidence. Indeed it was more likely to be aided; for a jury is certain to be quick to detect any thing which appears like an insult to a woman in their presence, and to resent the insult if in their power to do so. It is not likely the plaintiff's counsel failed to call the attention of the jury to any unnecessary and apparently baseless insinuations against his client, and he would be reasonably certain to have the sympathy of the jury with him in very plain and pointed comments. We do not think therefore that we ought to disturb the judgment for the improper admission of this evidence.

When defendant was on the stand he was asked with a view to discredit him whether he had not improperly approached a certain judicial officer, and whether he had not in a certain election been charged with buying votes. These and other similar questions were overruled. Obviously they had no hearing on the case on trial. A man cannot be said to be more likely to assault a woman because of being guilty of the conduct suggested. The ruling was correct.

Nothing further in the case seems to us to require comment, and the judgment must be affirmed.

Judgment affirmed.

The other justices concurred.

Whiting v. Ohlert.

WHITING V. OHLERT.

(52 Mich. 462.)

Statute of frauds — agreement for lease.

An oral agreement for a lease for a year, to commence in the future, is valid.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Stewart & Galloway, for appellant.

James H. Pound, for appellee.

CAMPBELL, J. This was an action by a tenant against his landlord for disturbance in his enjoyment. The main dispute was concerning the validity of the lease. The testimony tended to show an agreement by parol in April for a year's tenancy from the beginning of May. The court below held that an agreement by parol for a full term of a year, to begin in the future, was void under the statute of frauds. That statute provides that all contracts for the leasing for more than one year of lands shall be void unless in writing. Comp. L., § 4694; How. St., § 6181. The only other provision supposed to be involved is that which declares that every agreement which by its terms is not to be performed within one year must be in writing. Comp. L., § 4698; How. St., § 6185.

The distinction between an agreement for a lease and the lease itself was pointed out in *Tillman v. Fuller*, 13 Mich. 113. It is very well settled that a lease may be made to take effect in future, and that the estate does not begin with the contract, but with the future period. *Young v. Dake*, 5 N.Y. 463; *Trull v. Granger*, 8 N. Y. 115; *Wood v. Hubbell*, 10 N. Y. 479. It is held in New York, under a statute corresponding to ours, that an agreement by parol for a future term not exceeding one year is valid, and not within the statute. *Young v. Dake*, 5 N. Y. 463. That case is well considered, and is we think a fair construction of the statute, which ought not to be given a strained meaning. The same doctrine has been adhered to in that State, and is reaffirmed emphatically in *Becar v. Flues*, 64 N. Y. 518, where a tenant was held

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liable for the agreed rent, who had never gone into possession and had declined to do so.

Concurring as we do in this view of the law, we think the court below erred in its ruling, and should have allowed a recovery of damages for the injury done plaintiff. We note further in the record that the right of possession seems to have been determined in plaintiff's favor in proceedings before a commissioner, and we cannot understand why on any theory his recovery, to some extent at least, was questionable. But as tenant for a year he was of course entitled to larger damages.

The judgment must be reversed with costs and a new trial granted.

Judgment reversed.

The other justices concurred.

WILLIAMS V. MUTUAL GAS COMPANY.

(82 Mich. 400.)

Corporation — gas company — duty to serve all.

A gas company is bound to supply all individuals requiring it, on payment or reasonable security.

THE opinion states the case. The defendant had judgment below.

F. A. Baker, for appellant.

Meddaugh, Driggs & Harmon, for appellee.

SHERWOOD, J. The plaintiff, in the month of November, 1879, resided in Detroit and was in possession of and keeping the hotel known as the Biddle House, containing a very large number of rooms, all of which were furnished with gas-pipes and fixtures for the purpose of lighting the same, and which had been so lighted for many years.

The defendant corporation was duly organized under the act of the legislature for the formation of gas-light companies, approved

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February 12, 1855, and located in Detroit. On the 15th day of November aforesaid the defendant, in pursuance of said act of the legislature and the charter and by-laws of Detroit, was and had been for some time previous carrying on the business for which it was organized, supplying the citizens at hotels and private dwellings with gas in such quantities as desired, and among others had connected its pipes with those of the Biddle House, and for some time previous had been supplying it with gas as its proprietors desired. On that day the defendant refused to supply the Biddle House longer unless its proprietor, the plaintiff, would keep on deposit with the company \$100. It was receiving at that time about \$60 worth of gas per week, and its requirements were increasing.

The plaintiff regarding the demand as unreasonable, declined to make the required deposit, and tendered the defendant \$75 and demanded that the company should furnish him gas at the Biddle House to that amount. This the defendant refused to do and cut off the service at the hotel.

The plaintiff claims that it was the defendant's duty to furnish him with the gas required, and upon the terms demanded; that he has suffered great injury to his business in consequence of the defendant's neglect so to do. And he brings his suit in this case to recover his damages. A trial was had in the Superior Court of Detroit, and the judge directed a verdict for the defendant. The plaintiff brings error and the case is now before us on a bill of exceptions containing all the testimony.

The questions presented and argued before the judge of the Superior Court by counsel for defendant were, first, the plaintiff could not recover for the reason the defendant was under no legal duty or obligation to supply any citizen of Detroit with gas; and, second, if such duty was imposed upon the defendant, the conditions upon which the defendant proposed and offered to perform it were reasonable. The court disagreed with defendant's counsel in the first position, but sustained them in the second. I agree with the judge of the Superior Court that it is the duty of the defendant upon reasonable conditions, to supply the citizens of Detroit who have their residences and places of business east of the center of Woodward avenue, with gas wherever the defendant has connected its mains and service pipes with the pipes and fixtures used at such residences and places of business and the owners or occupants shall desire the same.

The defendant is a corporation in the enjoyment of certain rights and privileges, under the statutes of the State and charter and by-laws of the city, and derived therefrom. These rights and privileges were granted that corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity, and the duty of this corporation imposed cannot therefore be well likened to that of the innkeeper or common carrier, but more nearly approximates that of the telegraph, telephone or mill-owner. The company however in the discharge of its duty may govern its action by reasonable rules and regulations, and when it has done so, all persons dealing with it, as well as the company itself, must yield obedience thereto. The statute under which the defendant company is organized provides it may ordain and enact by-laws for that purpose; but the record discloses no such action taken on the part of the defendant; neither does it show any general action or custom of the company in making terms with, or for supplying gas to proprietors of hotels or other persons except as required in this case.

The president of the defendant company was sworn and examined, and testified that the defendant made weekly or monthly collections for gas furnished. He further said that the defendant refused to let the plaintiff have a supply for the Biddle House unless he would first sign a contract with the company therefor, and in addition thereto keep on deposit with the company the sum of \$100 so long as it furnished him with a supply; that the plaintiff tendered the defendant \$75, and demanded that the company should supply the house and offered to give good personal security for payment and performance on his part to the extent it should be furnished or the company require; and that the company refused to accept the terms proposed by plaintiff, or furnish his house with gas as required.

This corporation is authorized and permitted to do business in Detroit only upon the ground of public convenience, and that benefits may accrue to its citizens.

It is true that neither by the charter of the company, its articles of association, or the by-laws of the city authorizing its existence there, has it the exclusive right to manufacture and sell gas. It is however within the experience of us all, and I may say, I think, with great propriety, within the judicial knowledge of the courts,

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that the manufacture and supply of inflammable gas for the purpose of lighting cities, villages, stores, hotels and dwellings is not a domestic or family manufacture. It is carried on almost exclusively by public or associated capital, and to make it a paying industry requires the exercise and enjoyment of certain rights and franchises only to be acquired from municipal or State authority. Associations of this kind, as has been well said, "are not like trading and manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world." It is not a trading corporation, its product is designed for the citizen, and the extent to which it is used depends upon home consumption in the immediate neighborhood and community in which the manufacture is wrought. It is in the strictest sense a local commodity, and not commercial. It can only be used by consuming it, and hence can have no place with articles of trade. The success of the company greatly depends upon the necessity of the citizens in the vicinity of its location, and its operations may seriously affect the public policy and individual convenience of the community. The nature of the article made, the objects of the company, its relations to the community, and the rights and privileges it must necessarily exercise, give the company a public character, and to a certain extent, a monopoly which can never be tolerated, only upon the ground of some corresponding duty to meet the public want. Such duty rests upon this defendant, and I think it requires the company to furnish to this plaintiff, at the Biddle House, the supply of gas demanded, under reasonable rules and regulations, but among all such as might be mentioned, it is with the defendant to adopt and rely upon such as it may select. This is its privilege.

The duty of the company toward the citizens and that of the citizen toward the company, is somewhat reciprocal, and any rule or regulation or course of dealing between the parties which does not secure the just rights of both ought not to be adopted, and cannot receive the sanction of the courts.

When the defendant company made the connection of its service pipes and mains with the pipes and fixtures of the Biddle House, it imposed upon itself the duty to supply the house and premises upon reasonable terms and conditions with such amount of gas as the owner or proprietor might require for its use, and pay for, so long as the company should exist and do business.

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If the defendant, as one of such conditions, required the plaintiff to give sufficient security that he would make such payment and perform such conditions, before making such service, I think it would have been reasonable, but in the place of such security the defendant demanded a deposit of money with the company, as had been its custom. This the company had a right to do. The condition was a reasonable one. The requirement of a special contract between the parties, in addition to the deposit of money, may not be unreasonable, still it was quite unnecessary. The law implies all the contract needed, and courts will enforce it in all cases to the extent necessary to secure the rights of the parties.

I think the judgment of the Superior Court should be affirmed.

Judgment affirmed.

The other justices concurred.

PEOPLE v. ROBY.

(62 Mich. 577.)

Criminal law — agency.

The owner of a saloon whose clerk, without his knowledge or consent, but while he was on the premises, opened it on Sunday morning to clean it, and sold a drink to a customer, may properly be convicted of keeping a saloon open on Sunday.*

CONVICTION of keeping a saloon open on Sunday. The opinion states the case.

Jacob J. Van Riper, attorney-general, for People.

Jacob V. Rogers, for appellant.

COOLEY, C. J. The respondent, who is keeper of a hotel in the village of Plainwell, in which there is a bar for the sale of spiritu-

* See, as to intent, *Halsted v. State* (12 Vroom. 552), 32 Am. Rep. 247; *Redmond v. State* (36 Ark. 58), 38 Am. Rep. 24; *Farrell v. State* (32 Ohio St. 456), 30 Am. Rep. 614; *King v. State* (58 Miss. 787), 38 Am. Rep. 344; *Stern v. State* (53 Ga. 229), 21 Am. Rep. 266, and note, 268; *George v. Goby*, 128 Mass. 289; s. c., 35 Am. Rep. 376.

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ous and malt liquors, was prosecuted and convicted for not keeping his bar closed on Sunday, May 6, 1883. The evidence was that on the morning of that day the clerk of the hotel was in the bar-room and had a servant with him scrubbing it out when a person came in from the street. He appeared to be known to the clerk, who told him he did not want him there Sundays. The man said he wanted some whisky. The clerk told him he must get his whisky Saturday night. After some more words between them the clerk told him if he was going to get the whisky to get it and get out as soon as he could. He got the whisky, handed pay for it to the servant and went off. The respondent was not at the time present. The clerk testifies that he was somewhere about the house, but he thought he was not up yet; the servant says he was about there shortly afterward. There was no evidence in the case to show that respondent assented to the opening of the bar on that day, or expected or desired that it should be opened; neither was there any evidence to the contrary. He was not a witness on his own behalf.

The case comes to this court on writ of error, and the only question of importance is whether there was any evidence to be submitted to the jury.

The statute under which the conviction was had provided that "all saloons, restaurants, bars, in taverns or elsewhere, and all other places where any of the liquors," etc., "may be sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday," etc. How. St., § 2274; Public Acts, 1881, p. 350.

It will be observed that the requirement that the saloons and other places mentioned shall be closed is positive. The next section of the statute provides that any person who shall violate this, among other provisions, shall be deemed guilty of a misdemeanor, and shall be punished as therein prescribed. In terms then the penalties of the statute are denounced against the person whose saloon or other place for the sale of intoxicating drinks is not kept closed, and no other fact is necessary to complete the offense.

It is contended nevertheless that to constitute an offense under the section referred to, there must be some evidence tending to show an intent on the part of the respondent to violate it, and *People v. Parks*, 49 Mich. 333, which was a prosecution under another section of the same statute, is cited as authority. It should be said of that case that the facts are not fully given in the report, and that there

was positive evidence in the case to negative the intent in the respondent that the criminal act should be committed. But the case is plainly distinguishable from this. The section under which Parks was prosecuted makes not only the proprietor, but his clerks, agents, etc., individually liable for the conduct prohibited, and imposes upon them severally the duty to abstain from it. The section under which Roby is prosecuted makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon, etc., closed.

I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence, and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. Thus in Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating; *Commonwealth v. Boynton*, 2 Allen, 160; and of the offense of selling adulterated milk, though he was ignorant of its being adulterated. *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Holbrook*, 10 Allen, 200; *Commonwealth v. Waite*, 11 Allen, 264; *Commonwealth v. Smith*, 103 Mass. 444. See *State v. Smith*, 10 R. I. 258. In Missouri a magistrate may be liable to the penalty for performing the marriage ceremony for minors without consent of parents or guardians, though he may suppose them to be of the proper age. *Beckham v. Nacker*, 56 Mo. 546. Where the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age. *Commonwealth v. Raymond*, 97 Mass. 567. See *King v. Dixon*, 3 M. & S. 11. In *State v. Steamboat Co.*, 13 Md. 181, a common carrier was held liable to a statutory penalty for transporting a slave on its steamboat, though the persons in charge of its business had no knowledge of the fact. A case determined on the same principle is *Queen v. Bishop*, 5 Q. B. Div. 259; *r. c.*, 29 Eng. R. 283. If one's business is the sale of liquors, a sale made by his agent in violation of law is *prima facie* by his authority, *Commonwealth v. Nichols*, 10 Met. 250, and in Illinois the principal is held liable, though the sale by his agent was in violation of instructions. *Nuecker*

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v. *People*, 91 Ill. 494. In Connecticut it has been held no defense in a prosecution for selling intoxicating liquor to a common drunkard that the seller did not know him to be such. *Barnes v. State*, 19 Conn. 398. It was held in *Faulks v. People*, 30 Mich. 200; s. c., 33 Am. Rep. 374, under a former statute, that one should not be convicted of the offense of selling liquors to a minor who had reason to believe and did believe he was of age; but I doubt if we ought so to hold under the statute of 1881, the purpose of which very plainly is, as I think, to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril. There are many cases in which it has been held under similar statutes that it was no defense that the seller did not know or suppose the purchaser to be a minor. *State v. Hartfiel*, 24 Wis. 60; *McCutcheon v. People*, 69 Ill. 601; *Farmer v. People*, 77 Ill. 322; *Ulrich v. Commonwealth*, 6 Bush, 400; *State v. Cuin*, 9 W. Va. 559; *Commonwealth v. Emmons*, 98 Mass. 6; *Redmond v. State*, 36 Ark. 58; s. c., 38 Am. Rep. 24. And in *Commonwealth v. Finnegan*, 124 Mass. 334, the seller was held liable, though the minor had deceived him by falsely pretending he was sent for the liquor by another person. So a person has been held liable to a penalty for keeping naphtha for sale under an assumed name, without guilty knowledge; the statute not making such knowledge an ingredient of the offense. *Commonwealth v. Wentworth*, 118 Mass. 441. Other cases might be cited, and there is nothing anomalous in these. A person may be criminally liable for adultery with a woman he did not know to be married. *Fox v. State*, 3 Tex. App. 329; s. c., 30 Am. Rep. 144; or for the carnal knowledge of a female under ten years of age, though he believed her to be older. *Queen v. Prince*, L. R., 2 Cr. Cas. 154; *State v. Newton*, 44 Iowa, 45. And other similar cases might be instanced.

If intent were necessary to be found I should be of opinion there was enough in the case to warrant its submission to the jury. The bar was opened on Sunday by respondent's servants and on his business while he was about the premises. The purpose for which it was opened was immaterial; the offense was committed by opening it for cleaning as much as it would have been by opening it for the sale of liquors. *People v. Waldengel*, 49 Mich. 337. But the statute requires the proprietor at his peril to keep the bar closed. The purpose in doing so is that persons shall not be there within the reach of temptation. This respondent did not keep his bar closed and he has therefore disobeyed the law. And he has not

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only disobeyed the law, but the evil which the law intends to guard against has resulted ; that is to say, there has been, either with or without his assent — it is immaterial which — a sale of intoxicating liquors to a person who took advantage of the bar being open to enter it.

I think the Circuit Court should proceed to judgment.

SHERWOOD and CHAMPLIN, JJ., concurred.

So ordered.

CAMPBELL, J. In this case the charge of the judge was properly guarded as to the necessity of showing complicity of respondent in the act charged against him and as to the presumption of his innocence. But in my opinion the rules he laid down were inconsistent with the sufficiency of the facts to sustain a conviction. I think this conviction can only be maintained on the principle that an agent appointed for a confessedly legal purpose is presumed to be authorized to act illegally. I can see no reason why such presumption of should be lawful in one case and not in another. In all crimes the presumption of innocence must be the same. The charge here is distinctly criminal, and while the offense is one of importance to the public order, I think that the decisions which set up exceptional rules of evidence to prove it are of dangerous tendency and would not be safe precedents.

CARTWRIGHT V. CHICAGO AND GRAND TRUNK RAILWAY COMPANY.

(52 Mich. 606.)

Railroad — negligence — alighting.

When a railroad train draws up at a platform so that only the forward end of the smoking car is at the platform, a woman passenger in a rear car is not bound to go through the smoking car to alight, nor to alight from the front end of the rear car, and if she is injured in alighting from the rear end, in consequence of the position of the train, the company is liable. (*See note, p. 277.*)

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

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E. W. Meddough and M. V. Montgomery, for appellant.

H. R. Lovell and C. D. Long, for appellee.

COOLEY, C. J. This is an action for personal injury, and the plaintiff recovered in the Circuit Court. The only questions that need to be considered are, first, whether there was any evidence of negligence on the part of the defendant to be submitted to the jury; and second, whether the evidence conclusively showed contributory negligence on the part of the plaintiff.

The injury occurred December 28, 1881. The plaintiff was a woman sixty years of age, and resided with her husband who was still older and rheumatic, at Davison, a country station about nine miles west of Flint. On the day named she went to Flint with her husband, and returned on the evening train which arrived at Davison about nine o'clock. The train was composed of six cars, made up as follows: Mail car, express car, baggage car, smoker, way car and sleeper. Plaintiff and her husband entered the way car, which they found full, and took the rear seat behind the door. It was a dark, cloudy and wet evening. When the train stopped at Davison the evidence tends to show that the smoker stood partially along-side the station platform, but the way car was not up to it. No light was displayed at the rear end of the way car, nor as we conclude from the record, at the front end, but there was a light on the platform which would possibly aid in alighting there. A drunken man in one of the cars further forward appears to have had the attention of the men on the train when the train stopped, and aid was not given to the passengers in leaving the way car. The most of them went forward and alighted safely, but plaintiff and her husband got out at the rear end of the car. There is a road crossing at that place, and plaintiff was familiar with the locality. She had seen the cars stop there before, and passengers step down into the road, and she thought the car then stood where if she stepped down she would step into the level part of the road. She therefore stepped down in the dark. She had several packages on her left arm, but her right hand was at liberty, and with that she took hold of the iron rod by the side of the steps. Instead of being over the level road as she supposed, the end of the car was over a depression at the side of the road, and when her foot left the step she went down so far that her hold of the iron was broken and

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she fell to the ground. Her foot slipped on the wet ground and turned under, and her leg was broken. She lay helpless until assistance could be procured. It was not until after the train had left that she was taken up and carried into the station, and medical assistance obtained. During all the time of the stop no one connected with the train or employed by the defendant was giving assistance to the plaintiff or her husband, or looking after passengers at the rear end of the car they had occupied.

It is contended on the part of the defense that the plaintiff was negligent in leaving the car where she did ; that the only proper place for leaving was where there was light and where assistance was provided, and that if needful, she should have passed through the car in front of the way car from which, if not from the way car, she might have alighted upon the platform. It is further said that it is not expected passengers will leave the car at the rear end ; their duty is to pass to the front end and leave the other to passengers taking the car, who otherwise will be incommoded in getting aboard. And it is insisted the railroad company is under no obligation to station assistants at each end of every car to help passengers on and off ; the burden would be an unreasonable one and passengers have no right to demand or expect it.

It would no doubt be better that travellers should always leave a car by the front end, and it might be competent for a railroad company to make and enforce a rule requiring it. But it is not shown that this defendant has any such rule, and it is certain that there is no general custom now observed by the public to that effect. Passengers not only do leave the cars at the rear and front indifferently, but they are suffered to do so without objection, and probably a very large portion of them all are not aware that it is desired they should do otherwise. Under such circumstances it cannot be said that it is negligence *per se* for a passenger to leave the car at the rear. If there was negligence in this case it must arise from the fact of the darkness, the known fact that the rear of the car was not at the landing, and the uncertainty in respect to the ground where it stood.

If the front end of the car had been at the platform there would have been more reason for insisting that the plaintiff should have gone in that direction. But we think a woman is excusable for not desiring to pass through the smoking car, and she has a right to assume it is not expected of her. We also think that passengers,

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where not notified to the contrary, may rightly assume that it is safe to alight from the car wherever it is stopped for passengers to leave it. And if no light is given them to leave the car by they are not to be charged with fault for leaving in the darkness.

A review of the record satisfies us that the agents and servants of the defendants were not as careful and vigilant as they should have been in providing for the safety of the passengers in leaving the train. If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance or give warning, or to move the car to a more suitable place. This was decided in *Cockle v. London & S. E. Ry. Co.*, L. R., 7 C. P. 321; 2 Eng. R. 648, a case on its facts very similar to this, and the same principle has often been laid down in other cases. *Nicholson v. Lancashire, etc., R. Co.*, 3 H. & C. 534; *Foy v. London, etc., R. Co.*, 18 C. B. [N. S.] 225; *Brassell v. N. Y. Cent., etc., R. Co.*, 84 N. Y. 241; 3 Am. & Eng. R. Cas. 380; *Penn. R. Co. v. White*, 88 Penn. St. 327; and *Balt. & O. R. Co. v. State*, 60 Md. 449; 12 Am. & Eng. R. Cas. 149, are among those so holding. There was therefore evidence to go to the jury on the question of negligence in the defendant. And the peculiarity of the case is such that the same facts which tend to show negligence in the railroad company tend in the same degree to show that the plaintiff was without fault. If she had a right to assume that the landing place was safe, she was not negligent in stepping down as she did. It must be conceded that she did not exhibit a very high degree of caution, but we cannot say that it was not as much as the average passenger would have shown under like circumstances. It was very proper we think for the Circuit judge to submit the whole case to the jury.

The judgment must be affirmed.

Judgment affirmed.

The other judges concurred.

NOTE BY THE REPORTER.—See *Memphis etc., R. Co. v. Whitfield*, 44 Miss. 466; s. c., 7 Am. Rep. 669, and note, 706; *Mitchell v. Chicago and Grand Trunk R. Co.*, 51 Mich. 236; s. c. 47 Am. Rep. 566; *Ill. Cent. R. Co. v. Green*, 81 Ill. 19; s. c., 25 Am. Rep. 255. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346; s. c., 49 Am. Rep. 168.

In *Brassell v. New York, etc., R. Co.*, 84 N. Y. 244, defendant ran a train upon its road daily from S. to E. S., primarily for the purpose of carrying its employees to E. S., where it had a machine-shop and freight-house; it carried however on this train persons going as ordinary passengers, on payment of

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fare, and it was in charge of a uniformed conductor. There was a station-house at E. S., on the south side of the road; this train did not stop at the station, but at a point one thousand three hundred feet further east, opposite the freight-house located north of the road. At this point there were about twenty tracks; the road was not planked and there was nothing to indicate on which side passengers should leave the train. E., plaintiff's intestate, a girl seventeen years of age, took this train, in company with an old lady, at S. to go to E. S., where she resided. The train stopped at the usual place on the third track from the south. The two south tracks were used for ordinary passenger trains. E. got off on the south side of the train and assisted her companion to alight. There was a path about seventy feet west leading south to or near the house where she was employed, which was south of the road. The two walked a few steps in a south-westerly direction until they reached the second track, when a passenger train from the east, which was behind time and running thirty-five or forty miles an hour, struck and killed them both. In an action to recover damages the evidence tended to show that they did not look to the east after leaving the car, and that if they had done so they could have seen the approaching train; also that no person connected with the train gave any instructions to passengers where to alight or any warning of the approaching train. *Held*, the fact that the deceased did not look, while it was a material and important one for the consideration of the jury upon the point of contributory negligence, did not establish it as a matter of law; and that a refusal of the court to charge that it was *per se* negligence was not error.

The court, citing *Terry v. Jewett*, 78 N. Y. 838, said: "A passenger, when taking or leaving a railroad car at a station, has the right to assume that the company will not expose him to unnecessary danger; and while he must himself exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them a safe passage to and from the train. In this case the defendant received the deceased as a passenger. It stopped the train east of the regular stopping place for trains, for the convenience of its employees. But it was also the place for the alighting of passengers who might have taken passage in it. It gave no warning to the deceased of danger. It knew that the train from the east had not passed this point and was behind time. There was no direction to passengers not to get off on the south side, and nothing to indicate that it was improper to do so. If the deceased knew of the regular time for the eastern train to pass this point, she must also have known that it usually passed before the special train arrived. In view of the circumstances, we are of opinion that the case on the point of the negligence of the deceased was properly submitted to the jury, and that the court would not have been justified in withdrawing it from their consideration. The fact that the deceased did not look for the approaching train was a material and important fact to be considered by the jury upon the point of contributory negligence; but her omission to do so was not in law decisive against recovery."

In *Penn. Rail. Co. v. White*, 88 Penn. St 327, W. took passage on a local train for "Penn Valley." After leaving the first station east of his destination

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the brakeman, as was the custom of the road, announced "The next station will be Penn Valley." Shortly after the train slowed up and stopped opposite a platform and station-house marked "Penn Valley Station." W. stepped off the car on the left side for the purpose of crossing the track to reach the platform, and was struck by a passing express train and instantly killed. It appeared that the train had stopped in compliance with a rule of the company, that the local trains should give the preference to express trains at stations, and that the regular platform for local passengers to alight was on the right and some distance beyond where the train had stopped. *Held*, that the question of contributory negligence was properly submitted to the jury.

The court said. "Negligence has been defined to be 'the absence of care according to the circumstances,' and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and degree of care varies according to circumstances, the question of negligence is necessarily for the jury. There are however certain duties of a precise and determinate nature, the neglect of which the law declares negligence *per se*. Thus it has been repeatedly held that it is the duty of a person about to cross a railroad track to stop, look and listen, and the failure to do is negligence. *Pennsylvania Railroad Co. v. Beule*, 73 Penn. St. 504, s. c., 18 Am. Rep. 753; *Nagle v. Allegheny Valley Railroad Co.*, 88 Penn. St. 35; s. c., 32 Am. Rep. 413. But this rule is not always applicable to passengers leaving a train and crossing the track to reach the depot at the point of destination. There are duties which spring from the relations existing between the carrier and its passengers. It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so. *Railroad Co. v. Aspell*, 11 Harris. 147. Ordinary prudence and due regard for the safety of passengers alike require that special care should be exercised at public crossings and depots by passing trains. In view of this the company has provided by rule No. 99, of its regulations 'That trains approaching stations, on double track, where a passenger train may be standing, receiving or discharging passengers, must be stopped before reaching the passenger train, and not go forward until the passenger train moves on, or signal is given to come on.' * * *

"These were all questions of fact for the jury, and in submitting them the learned judge, among other things, said: 'The main question is whether the deceased was guilty of negligence in attempting to land or leave the cars at the point and in the manner he did. Ordinarily it would be negligence in a person attempting to leave a train and cross a track, unless he stopped, looked and listened for an approaching train. It has been very truly said that this rule of law originated and has been applied in cases where persons were travelling with teams, etc., on highways which crossed railroads at grade, and where common prudence would forbid any one to cross without what has been determined ordinary caution. The rule of law should be applied in this case, unless the regulations of the company avoided its application.'

"He then suggested to the jury the inquiry whether the deceased 'was in-

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duced by reason of any invitation in the conduct of the company to land at this particular point; and, in that part of his charge covered by the fifth assignment of error, instructed them that if he had reason to presume fairly, from the conduct of those in charge of the train, that he had arrived at the station, he had a right to rely on the observance of the company's rule, forbidding another train to pass the station while his train remained there. In this there was no error. Whether he knew of the existence of the company's rule or not, he might reasonably assume under the circumstances that he could safely cross the track and reach the platform without fear of a train passing while his train was there. The testimony, as to the time, place and circumstances, was all proper for the consideration of the jury on the question submitted to them, and it was left to them with instructions which could not be misunderstood."

In *Baltimore and Ohio R. Co. v. State*, 60 Md. 449, the court said: "Here the deceased was a passenger, with a ticket that entitled him to be carried safely from Hagerstown to Frederick. By the regular route and mode of carriage it was necessary for him to change cars at the Weverton Station, and to cross over the intervening track of the defendant from one train to another. In making this transit he continues to be a passenger of the defendant, and entitled to the protection that the highest degree of care on the part of the defendant could afford, under the circumstances. In leaving the train from Hagerstown, at the station, and in crossing over the intervening track from one platform to the other, in order to take the east-bound train, the deceased might well assume that the defendant would not expose him to any danger, which by the exercise of due care could be avoided. And though the deceased himself was required to exercise reasonable care, yet we may suppose that his watchfulness was naturally lessened by his reliance upon the faithful observance by the employees of the defendant of such precautionary rules and regulations as would secure to passengers a safe transfer from one train to the other. And except in the presence of immediate apparent danger he was authorized to act upon such reliance. For the general rule that applies in ordinary cases of parties crossing railroad tracks, that they should stop, look and listen, before making the venture, does not apply in a case like the present. In such case as this, the rule is, as established by a number of well considered cases, that the passenger of the railroad is justified in assuming that the company has, in the exercise of due care, so regulated its trains that the road will be free from interruption or obstruction when passenger trains stop at a depot or station to receive and deliver passengers. Upon any other principle the lives of passengers might be most dangerously exposed, in the hurry, noise and confusion that generally attend the transfer of passengers at a connecting station. *Warren v. Fitchburg R. Co.*, 8 Allen, 237; *Gaynor v. Old Colony & Newport R. Co.*, 100 Mass. 208, 215; *Terry v. Jewett*, 78 N. Y. 838, *Brassell v. N. Y. Cent. & H. R. R. Co.*, 84 N. Y. 241; *Klein v. Jewett*, 26 N. J. Eq. 474; affirmed in 27 N. J. Eq. 550.

"By the first instruction the jury were required to find 'that the killing of the deceased resulted directly from the want of the exercise of ordinary care and prudence on the part of the agents of the defendant, and not from the

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want of ordinary care and prudence of the deceased, contributing to the accident.' If those facts were found, notwithstanding there may have been a want of ordinary care on the part of the deceased in attempting to cross the railroad track under the circumstances, the right to recover was not necessarily precluded. It is not every fault or want of ordinary care on the part of the party injured, in connection with the happening of the accident, that will defeat the right to recover. The books abound with cases to the contrary "

In *Taber v. Delaware, etc., Railroad Company*, 71 N. Y. 489, plaintiff was a passenger on defendant's road; she had a ticket for W.; she was not familiar with that station, but knew it was the next station to C. F., and about three-fourths of a mile therefrom. The night was dark, there was no depot at W. nor station light, nor any thing to indicate the stopping place to a person not familiar with it. She knew when the train passed C. F., and as her evidence tended to show, after the proper interval to run the distance to W. the train came to a full stop; it had, in fact, run by the station. Before reaching it the brakeman announced the station, several passengers arose to leave, plaintiff then rose from her seat near the centre of the car, walked out upon the platform, took hold of the rail, stepped down one step and was in the act of stepping to the second, when the train with a violent jerk started back, throwing her down and off, and she was injured. In an action to recover damages, *held*, that it was a question for the jury, whether in the exercise of reasonable care and prudence, defendant should not have given notice to passengers desiring to alight at the station, that the train had not come to a final stop but would back up; and that the plaintiff was justified, under the circumstances, in supposing she had reached her destination and in attempting to leave the car; at least that the question of contributory negligence on her part was proper for the jury.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

**GRAVES v. LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD
COMPANY.**

(137 Mass. 83.)

Carrier — valuation in bill of lading.

A shipper of goods for carriage is bound by an agreed valuation in the bill of lading and a stipulation that such valuation is to be the limit of recovery in case of loss.*

ACTION for value of goods lost. The opinion states the case. The plaintiff had judgment below.

H. G. Parker & J. H. Fiske, for plaintiffs.

A. L. Soule & F. H. Gillett, for defendant.

MORTON, C. J. The defendant, as a common carrier, received at Peoria, Illinois, seventy-five barrels of high wines, and agreed to deliver them to the plaintiffs at Boston, in this Commonwealth. The bill of lading contained the stipulation that the goods were "shipped at an agreed valuation of \$20 per barrel, owner's risk of leakage." It also contained the agreement, that "in the event of the loss of any property for which responsibility attaches under this

*See *Black v. Goodrich Transportation Co.* (53 Wis. 819), 43 Am. Rep. 713.

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bill of lading to the carriers, the value or cost of the same at the time and point of shipment is to govern the settlement, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based."

The defendant had no knowledge of the value of the goods except that furnished by the statement of the shippers, and the charge for transportation was based upon this statement and valuation. The goods were destroyed during the transit by a collision of two trains, occasioned by the negligence of the servants of the defendant. The only question presented is whether the plaintiffs can recover any more than the agreed valuation of the goods.

The question whether a carrier can, by a special contract, exempt himself from liability for a loss arising from the negligence of himself or his servants, is one which has been much discussed, and upon which the adjudications are conflicting. If we adopt the general rule that a carrier cannot thus exempt himself from responsibility, we are of opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability for the negligence of its servants. It has made no contract for that purpose, but admits its responsibility; its claim is, that the plaintiffs, having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value.

It is the right of the carrier to require good faith on the part of those persons who deliver goods to be carried, or enter into contracts with him. The care to be exercised in transporting property, and the reasonable compensation for its carriage, depend largely on its nature and value, and such persons are bound to use no fraud or deception which would mislead him as to the extent of the duties or the risks which he assumes. It is just and reasonable that a carrier should base his rate of compensation, to some extent, upon the value of the goods carried; this measures his risks, and is an important element in fixing his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representation and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from

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that into which he has entered. *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Judson v. Western Railroad*, 6 Allen, 486.

The plaintiffs admit that their valuation of the goods would be conclusive against them in case of a loss from any other cause than the negligence of the carrier or its servants; but contend that the contract does not fairly import a stipulation of exemption from responsibility for such negligence. We cannot see the justice of this distinction. Looking at the matter practically, everybody knows that the charges of a carrier must be fixed with reference to all the risks of the carriage, including the risk of loss from the negligence of servants. In the course of time, such negligence is inevitable, and the business of a carrier could not be carried on unless he includes this risk in fixing his rates of compensation. When the parties in this case made their contract, it is fair to assume that both had in mind all the usual risks of the carriage. It savors of refinement to suppose that they understood that the valuation of the goods was to be deemed to be fixed if a loss occurred from some causes, but not fixed if it occurred from the negligence of the servants of the carrier. Such does not seem to us to be the fair construction of the contract.

The plaintiffs voluntarily entered into the contract with the defendant; no advantage was taken of them; they deliberately represented the value of the goods to be \$20 per barrel. The compensation for carriage was fixed upon this value; the defendant is injured and the plaintiffs are benefited by this valuation, if it can now be denied. We are of opinion that the plaintiffs are estopped to show that it was of greater value than that represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person who in such contract fixes a value upon his goods which he intrusts to the carrier should not be bound by his valuation. *M'Cance v. London & North Western Railway*, 7 H. & N. 437; s. c., 3 H. & C. 343; *Railroad v. Fraloff*, 100 U. S. 24; *Muser v. Holland*, 17 Blatchf. 412; s. c., 1 Fed. Rep. 382; *Hart v. Pennsylvania Railroad*, 2 McCrary, 333; *Magnin v. Dinsmore*, 70 N. Y. 410; s. c., 26 Am. Rep. 608.

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We are therefore of opinion, upon the facts of this case, that it was not competent for the plaintiffs to show that the value of the goods lost was greater than \$20 per barrel.

Judgment affirmed.

GERTZ V. FITCHBURG RAILROAD COMPANY.

(137 Mass. 77.)

Evidence — rebutting infamy.

To rebut evidence of a witness' conviction of crime his present character and reputation for truth may be shown, but not his innocence of the crime.

ACTION for personal injuries. The opinion states the case. The defendant had judgment below.

J. J. Myers, for plaintiff.

C. A. Welch, for defendant.

HOLMES, J. In this case, the plaintiff having testified as a witness, the defendant put in evidence the record of his conviction in 1876, in the United States District Court, of the crime of falsely personating a United States revenue officer. The plaintiff then offered evidence of his character and present reputation for veracity, which was excluded, subject to his exception.

We think that the evidence of his reputation for truth should have been admitted and that the exception must be sustained. There is a clear distinction between this case and those in which such evidence has been held inadmissible, for instance, to rebut evidence of contradictory statements; *Russell v. Coffin*, 8 Pick. 143; *Brown v. Mooers*, 6 Gray, 451; or where the witness is directly contradicted as to the principal fact by other witnesses. *Atwood v. Dearborn*, 1 Allen, 483.

In such cases it is true that the result sought to be reached is the same as in the present — to induce the jury to disbelieve the witness. But the mode of reaching the result is different. For while contradiction or proof of contradictory statements may very well have the incidental effect of impeaching the character for truth of the contra-

dicted witness in the minds of the jury, the proof is not directed to that point. The purpose and only direct effect of the evidence are to show that the witness is not to be believed in this instance. But the reason why he is not to be believed is left untouched. That may be found in forgetfulness on the part of the witness, or in his having been deceived, or in any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general good character for truth, as well as for the other virtues; and until the character of a witness is assailed, it cannot be fortified by evidence.

On the other hand, when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit. 1 Gilb. Ev. [6th ed.] 126.

The conviction in the United States District Court was for a felony punishable with imprisonment (U. S. Stat. of March 2, 1867, § 28); and assuming that it stands on the same footing as a conviction in another State, it would have been admissible, according to the dicta in our cases, independently of statute, not to exclude the witness, but to impeach his credit. *Commonwealth v. Green*, 17 Mass. 515, 541; *Commonwealth v. Knapp*, 9 Pick. 496, 511; *Ulley v. Merrick*, 11 Met. 302. See Rev. Stats., chap. 94, § 56. And when a conviction is admitted for that purpose, it always may be rebutted by evidence of good character for truth. *Commonwealth v. Green*, *ubi supra*; *Russell v. Coffin*, 8 Pick. 143, 154; *Rex v. Clarke*, 2 Stark. 241; *Webb v. State*, 29 Ohio St. 351.

It is true that a doubt is thrown upon this doctrine in *Harrington v. Lincoln*, 4 Gray, 563, 568; but that case was decided on the ground that the cross-examination which showed that the witness had been charged with a crime also showed that he had been acquitted, and cannot be regarded as an authority against our decision, whether the *ratio decidendi* adopted be reconcilable with later cases or not. *Commonwealth v. Ingraham*, 7 Gray, 46.

The applicability of the foregoing reasoning is made clear by the

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language of our statutes. By the Pub. Stats., chap. 169, § 19, the only purpose for which conviction of a crime may be shown, in any case, is to affect credibility. Even if the conviction proved here would have excluded the witness but for the statute cutting down its effect, it could not be maintained that evidence of reputation for truth remained inadmissible because it would have been so when the witness was excluded. The statute puts all convictions of crime on the same footing, — those which formerly excluded, those which always have gone only to credibility, and it would seem, those which formerly would not have been admissible at all. (We assume that the words “a crime” in the Pub. Stats., chap. 169, § 19, mean the same as “any crime” in the Stat. of 1870, chap. 393, § 3; Gen. Stats., chap. 131, § 13; Stats. 1852, chap. 312, § 60; 1851, chap. 233, § 97; *Commonwealth v. Hall*, 4 Allen, 305.) And therefore any evidence which was admissible to rebut a conviction that only discredited before the statute, must now be admissible to rebut all convictions that may be put in evidence. Whether any different rule would apply when the fact is only brought out on cross-examination we need not consider.

The exception to the exclusion of evidence that the witness was innocent of the offense of which he was convicted, and explaining why he was convicted, is not much pressed, and is overruled. *Commonwealth v. Gallagher*, 126 Mass. 54.

Exceptions sustained.

LINNEHAN V. ROLLINS.

(137 Mass. 128.)

Master and servant — contractor — negligence.

A contractor agreed with trustees of an estate to take down a building for them, carefully, and under their direction and subject to their approval. *Held*, that defendants were liable for injury to a third person by the contractor's negligence in the work.*

ACTION for personal injuries by negligence. The head-note shows the point. The judge instructed the jury upon the

* See *Samuelson v. Cleveland Iron Mining Co.* (49 Mich. 164), 48 Am. Rep. 456; *Hughes v. Railroad Co.*, 39 Ohio St. 461.

effect of said contract as follows: "The plaintiff contends that there was negligence both on the part of Wentworth and the men under his employ in placing this derrick, and on the part of Elston in removing this derrick. So far as regards Wentworth, the relation in which he stands to the defendants is a matter of verbal proof, and the principles which I have given you are to be applied in determining upon the evidence what that relation was. So far as Elston is concerned, the relation in which he stood to the defendants at the outset is a matter of written contract, and where there is a written contract between parties, the construction of that written contract is a matter of law. This contract implies in substance that Elston is to take down the entire building known as the Adams House, or so much thereof as the trustees may request, and in conclusion, that all of the work is to be done carefully, and under the direction and subject to the approval of the trustees. This contract gives the defendants the right to control and direct the action of Elston. It is not simply a provision that the work must finally meet their approval before they pay him, but it is a provision that in the first instance he is to take down just so much of it as they desire, and that he is to do the work of taking down under their direction. There is no other mode of construing it than so as to mean that he, by this contract, was subject to their orders as to the time and manner and mode of doing the work; that they had the right to step in and say to him, 'You are not doing this as we directed you to do it. We direct you to do thus and so, and we direct you to do this in the other way.' That seems to me, as far as the contract is concerned, to bring the case within the relation of master and servant, so far as Elston and the defendants are concerned. You will observe, that although there has been evidence introduced upon the one side and the other, as to the actual control which the trustees, through one of their number, exercised over the work, and that is all proper and competent evidence for you in considering the matter, yet that the absolute test is not the exercise of power of control, but the right to exercise power of control. If, for instance, there was nothing in the case but this contract, and there was no question that the parties were acting under it, if that is the view you take of it, and that the injury was occasioned by the negligence of Elston, then although the trustees should be across the Atlantic, nevertheless under the instructions I give you, if they retained the power to control and direct the work, they

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would be liable ; because it is the possession of the right of interference, the right of control, that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly. If they have retained to themselves the right of directing the mode of doing the work, then if the work is done wrong, the imple principle is that they are responsible."

The jury returned a verdict for plaintiff.

W. B. Gale & J. W. Rollins, for defendant.

S. B. Allen & J. R. Murphy, for plaintiff.

FIELD, J Whether an owner of a building retains such control over work to be done and the manner of doing it as to render himself responsible for injuries occasioned by the negligence of a contractor and his employees in the performance of the work, depends upon the construction to be given to the contract. *Erie v. Culkins*, 85 Penn. St. 247; s. c., 27 Am. Rep. 643; *Railroad v. Hanning*, 15 Wall. 649; *Eaton v. European & North American Railway*, 59 Me. 520; s. c., 8 Am. Rep. 430; *Cincinnati v. Stone*, 5 Ohio St. 38; *Newton v. Ellis*, 5 El. & Bl. 115; *Blake v. Thirst*, 2 Il. & C. 20.

In this case, for the reasons given in the instructions, we think the defendants are liable for injuries occasioned by the negligence of Elston and his employees in doing the work which the defendants requested Elston to do. *Railroad v. Hanning*, *ubi supra*; *Clapp v. Kemp*, 122 Mass. 481; *Brackett v. Lubke*, 4 Allen, 138; *Brooks v. Somerville*, 106 Mass. 271; *Forsyth v. Hooper*, 11 Allen, 419; *Kimball v. Cushman*, 103 Mass. 194; s. c., 4 Am. Rep. 528.

Exceptions overruled.

TINDLEY V. CITY OF SALEM.

(137 Mass. 171)

Municipal corporation — negligence — fire-works.

A city, authorized to appropriate money to celebrate holidays, and undertaking a display of fire-works exclusively for the amusement of the citizens, is not liable to one injured by such fireworks through the negligence of the city's servants.*

* See *Ball v. Town of Woodbine* (61 Iowa, 83) 47 Am. Rep. 805.

ACTION for personal injury by negligence. The head-note shows the point. The defendant had judgment on demurrer.

C. J. Thompson and W. F. M. Collins, for plaintiff.

J. A. Gillis, for defendant.

C. ALLEN, J. It may not be easy to reconcile all of the *dicta*, and perhaps not all of the decisions, in actions in which it has been sought to hold cities or towns responsible for injuries to persons or property sustained through negligence or wrong-doing on the part of the cities or towns themselves, or of persons alleged to have acted as their agents or servants. Many of the cases however can be distributed into classes, which have now come to be recognized, although in some instances the principles upon which the decisions ought ultimately to rest may still be somewhat shadowy.

There are certain cases where the act of the city or town has of itself a natural and direct tendency to injure the property of another, quite irrespectively of any negligence in the performance of it. In such cases, if the act is within the authority of the city or town, it is responsible. *Locks & Canals v. Lowell*, 7 Gray, 223; *Hildreth v. Lowell*, 11 Gray, 345; *Haskell v. New Bedford*, 108 Mass. 208; otherwise, not. *Lemon v. Newton*, 134 Mass. 476; *Cushing v. Bedford*, 125 Mass. 526.

There are other cases where it has been held that it is the duty of a city or town, in building a highway or bridge across a natural stream of water, to make and maintain a suitable provision for the free passage of the water, so that it shall not be set back, and that the city or town is responsible for any failure in the performance of this duty, and as such failure is usually through negligence, the remedy is usually by an action at law. *Lawrence v. Fairhaven*, 5 Gray, 110, 116, 119; *Perry v. Worcester*, 6 Gray, 544; *Parker v. Lowell*, 11 Gray, 353; *Wheeler v. Worcester*, 10 Allen, 591.

There are other cases where a city or town has undertaken to build and maintain particular works, as for example, sewers, water-works and gasworks, in part for the general benefit, and in part for the benefit of such individuals as may be able to use them advantageously, and where the expense is defrayed in the first instance, either wholly or partly, by assessments upon the estates immediately benefited, or where a charge is made by way of toll or rent to those who

avail themselves of the benefit of the works. In such cases the work is not undertaken purely as a matter of common public convenience and service, for the benefit of all alike, but the city or town acts as an agency to carry on an enterprise partly commercial in its character, for the purpose of furnishing conveniences and benefits to such as pay for them. The element of a consideration comes in, and in such cases it is usually held that a liability exists for an injury to an individual through negligence in building or maintaining the works. *Child v. Boston*, 4 Allen, 41; *Oliver v. Worcester*, 102 Mass. 489, 500; s. c., 3 Am. Rep. 485; *Emery v. Lowell*, 104 Mass. 13; *Merrifield v. Worcester*, 110 Mass. 216; s. c., 14 Am. Rep. 592; *Murphy v. Lowell*, 124 Mass. 564; s. c., 35 Am. Rep. 381.

There are other cases, of which the repair of roads and bridges furnishes the usual example, where a city or town, by reason of its statutory liability for injuries sustained through neglect of keeping ways safe and convenient for travellers, and of the statutory penalties upon it for defective ways, as well as by reason of its responsibility for the cost of construction, incurs a liability by undertaking the performance of a public work, in which it has a direct pecuniary interest, to see that it is done not only economically, but thoroughly. In some of these cases the assumption of the work by the town itself has been voluntary, and apparently because it preferred that the work should be done by special agents rather than by the surveyors or others, upon whom, in the absence of such special provision, the law would devolve the duty of prosecuting it. But in all such cases a prominent element in the action of the city or town must have been with reference to its continuing liability to statutory penalties or responsibility in damages to persons who might receive injuries in their persons or property through defects in the ways. This consideration was made the foundation of the decision in *Hawks v. Charlemont*, 107 Mass. 414. The case of *Deans v. Randolph*, 132 Mass. 475, is of the same class. In *Sullivan v. Holyoke*, 135 Mass. 273, there was evidence tending to show that as incident to its liability for defective ways, the city had undertaken to light the streets, though not bound to do so, and that it kept naphtha for that purpose and stored it negligently. The case was a close one; but in the opinion of a majority of the court it fell within the principle of *Hawks v. Charlemont* and *Deans v. Randolph*. All that was decided in *Perry v. Worcester*, *ubi supra*, may also stand also upon the same ground, as well as upon the

ground heretofore mentioned. The city had voluntarily assumed, by agents of its own, to rebuild a bridge which it was bound to maintain and keep in repair ; and it performed the work in such a manner as to cause injury to private property, through unskillfulness or negligence. In all of these causes the city or town was acting, not merely in the discharge of a public service, but also with reference to penalties and liabilities imposed upon it by law for imperfect work. The pecuniary motive came in. It was acting in furtherance of its own pecuniary interest, as well as for the benefit of the public.

Easily distinguishable from these are the cases where the city or town is exonerated from liability, on the ground that the wrongful act complained of is not its act but the act of persons who are deemed to be public officers, existing under independent provisions of law ; officers who, though appointed and paid by the city or town, and though perhaps its agents or servants for other purposes are yet held not to sustain this relation in respect to the particular act in question ; as for example, members of a fire department, *Hafford v. New Bedford*, 16 Gray, 297 ; *Fisher v. Boston*, 104 Mass. 87 ; s. c., 6 Am. Rep. 196 ; highway surveyors, *Walcott v. Swampscott*, 1 Allen, 101 ; superintendent of streets, *Barney v. Lowell*, 98 Mass. 570 ; police officers, *Bultrick v. Lowell*, 1 Allen, 172 ; overseers of the poor, *New Bedford v. Taunton*, 9 Allen, 207 ; assessors and collector of taxes, *Rossie v. Boston*, 4 Allen, 57 ; *Alger v. Foston*, 119 Mass. 77 ; deputy collector, *Dunbar v. Boston*, 112 Mass. 75 ; selectmen, *Cushing v. Bedford*, *ubi supra* ; board of aldermen, *Child v. Boston*, 4 Allen, 51 ; and even the city government itself, *Griggs v. Foote*, 4 Allen, 195.

There is another class of cases where cities or towns have been held to be not liable for negligence, when, acting under general laws applicable to all cities and towns alike, they have undertaken a particular service or work which has no direct or natural tendency to injure any individual in person or property, and no element of special corporate advantage as a consideration for undertaking it, or of pecuniary profit or contribution from individuals especially benefited, either by way of aid in the performance of the work, or of compensation for its use or benefit after its completion ; and where no pecuniary penalty or liability is imposed by statute in case of defective or negligent performance of the undertaking ; but where their action is exclusively and purely as a matter of public

service for the general and common good. In some cases the statutes enjoin such service upon cities and towns and in others permit it. The decisions in *Hafford v. New Bedford* and *Fisher v. Boston*, already cited, fall within this class, and rest as well upon this ground as upon the doctrine of master and servant. So also the case of *Bigelow v. Randolph*, 14 Gray, 541, where it was held that the town was not liable for a personal injury to a scholar attending a public school, received by falling into a dangerous excavation negligently left in a schoolhouse yard. *Oliver v. Worcester*, *ubi supra*, also furnishes a good illustration of this ground of exemption from liability. And in the case of *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332, it was held, on the greatest consideration and upon a very full review of the authorities, that the city of Boston was not liable in an action brought by a child attending a public school, for an injury sustained through the negligent construction of a school-house which the city was bound by a general law to provide and maintain. The duty resting upon the city in that case was imperative. The reasoning upon which the decision rests would be directly applicable to the present case, but for the distinction that the negligence now complained of was not in the performance of a duty imperatively required, but of a service voluntarily assumed by the defendant, under the authority of the Pub. Stats., chap. 28, § 13. This statute provides that the city council of a city may, by a yea and nay vote of two-thirds of the members of each branch thereof present and voting, appropriate money, to a certain limited amount, for armories for the use of military companies, for the celebration of holidays, and for other public purposes. The same question arose in *Morrison v. Lawrence*, 98 Mass. 219, but the case went off on another ground.

In our opinion, this distinction does not affect the resulting liability. There are many provisions of statute, by which all municipal corporations must do certain things, and may do certain other things, in each instance with a view solely to the general good. In looking at these provisions in detail, it is impossible to suppose that the legislature have intended to make this distinction a material one in determining the question of corporate liability to private actions. For example, towns must maintain pounds, guide-posts and burial grounds; and may establish and maintain hospitals, work-houses or alms-houses, town halls, libraries, monuments in memory of soldiers, public baths, quarantine grounds, and watch

and ward; and may raise money for the destruction of noxious animals, for centennial celebrations, for shade trees, for the detection and apprehension of felons, and for building armories. Pub. Stats., chap. 36, § 20; chap. 53, § 1; chap. 82, § 9; chap. 80, § 76; chap. 84, § 20; chap. 33, § 1; chap. 27, § 41; chap. 40, § 10; chap. 27, §§ 10, 13; chap. 80, § 62; chap. 34, § 1; chap. 27, §§ 10, 11, 12; chap. 14, § 94. In some instances large towns must and small towns may do certain things. Every town may, and every town containing five hundred families must, maintain a high school; every town may, and every city and town having more than ten thousand inhabitants must provide for instruction in industrial and mechanical drawing; towns if they see fit may also establish and maintain industrial and nautical schools; and every town not divided into school districts must provide and maintain a sufficient number of school-houses. Pub. Stats., chap. 44, §§ 2, 7, 8, 9, 46. Each town containing more than three thousand inhabitants must, and every town may, keep and maintain a lockup. Pub. Stats., chap. 27, § 32.

In all of these cases the duty is imposed or the authority conferred for the general benefit. The motive and the object are the same, though in some instances the legislature determines finally the necessity or expediency, and in others it leaves the necessity or expediency to be determined by the towns themselves. But when determined, and when the service has been entered upon, there is no good reason why a liability to a private action should be imposed when a town voluntarily enters upon such a beneficial work, and withheld when it performs the service under the requirement of an imperative law. To make such a distinction would not have the effect to encourage towns in making liberal provision for the public good. It is well known that many towns in Massachusetts, not bound to do so, voluntarily maintain high schools. It is not to be supposed that the legislature have intended to make such towns liable to private actions, when towns required to maintain high schools would be exempt. On the other hand, it has been recognized in numerous cases, in this State and elsewhere, that the question of the liability of towns does not rest upon this distinction. *Bugelow v. Randolph*, *Hafford v. New Bedford*, and *Fisher v. Boston*, *ubi supra*; *Clark v. Waltham*, 128 Mass. 567; *Eastman v. Meredith*, 86 N. H. 284; *Wixon v. Newport*, 13 R. I. 454; s. c., 43 Am. Rep. 85; *Richmond v. Long*, 17 Gratt. 375.

Messenger v. Dennie.

The *dictum* of Chief Justice SHAW, in *Anthony v. Adams*, 1 Met. 284, that "an action upon the case will lie against municipal corporations, when such corporations are in the execution of powers conferred upon them, or in the performance of duties required of them by law, and their officers, servants and agents shall perform their acts so carelessly, unskillfully, or improperly as to cause damage to others," is sometimes cited as declaring that in the case supposed, such action will lie always and under all circumstances; whereas it was only intended to assert that a municipal corporation is not exempt from liability in an action on the case, and to declare that such an action may be maintained, under proper circumstances that is to say that a municipal corporation is not merely by reason of its corporate character exempt from such action under proper circumstances.

We are of opinion that the present case falls within the principle or *Hill v. Boston*; that the ground of distinction sought to be established is untenable; and that the celebration of a holiday when undertaken by a city exclusively for the gratuitous amusement, entertainment or instruction of the public, under the authority of the general law already referred to, which is applicable to all cities alike, does not render the city liable to an action by an individual who has sustained a personal injury through negligence in carrying out the celebration.

We cannot think that the legislature, while carefully limiting the amount which may be expended for the purposes in question, intended to impose upon cities a liability to private actions. If such an extension of liability had been intended, we think it reasonable to suppose that the legislature would have expressed such intention in plain terms.

Judgment affirmed.

MESSENGER V. DENNIE.

(137 Mass 197.)

Negligence — contributory — infant.

A boy, about nine years old, riding on the runners of sleighs in the streets, suddenly leaving such a sleigh in motion, without looking behind him, within thirty feet of a following horse, and so struck and injured, is guilty of contributory negligence fatal to his recovery of damages.

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ACTION for personal injury by negligence. The head-note shows the case. The plaintiff had judgment below.

C. F. Kittridge & C. A. Williams, for defendant.

R. P. Clapp, for plaintiff.

W. ALLEN, J. There was no evidence of due care on the part of the plaintiff. He voluntarily and thoughtlessly put himself in a position of great and obvious danger. He suddenly left the sleigh on which he was riding, while it was in motion, in a frequented thoroughfare, and within thirty feet of the defendant's horse, without looking back or thinking of what might be following. His injury was the natural consequence of his careless act. He was engaged in the sport of riding upon the runners of sleighs in the public streets with the consent of his parents; and if he was too young to appreciate the danger of his act, he was too young to engage in that sport, and his parents were negligent in permitting it.

For this reason, without considering whether there was any evidence of negligence on the part of the defendant, the court should have ruled that the plaintiff could not recover.

Exceptions sustained.

BERRENBURG V. CITY OF BOSTON.

(187 Mass. 331.)

Evidence — negligence — subsequent state of street.

In an action against a city for a personal injury sustained by falling on an icy sidewalk, evidence is competent to show the like condition of the sidewalk seventeen days later, and the height, slope and surface thereof, and twenty-five feet distant, there being no evidence of any intermediate change. (*See note, p 297*).

ACTION for personal injury by falling on an icy sidewalk. The head-note states the point. The plaintiff had judgment below.

T. M. Babson, for defendant.

F. D. Ely, for plaintiff.

C. ALLEN, J. The bill of exceptions does not undertake to give all the evidence in the case, nor to state the grounds upon which the evidence now in question was submitted, nor to show with what instructions it was submitted to the jury; and we have only to consider whether it was competent in any aspect. For the purpose of corroborating direct evidence that large ridges of ice were found upon the sidewalk at a particular place and upon a particular day, if that fact was in controversy, other evidence would be admissible to show that the situation of the sidewalk with reference to the adjacent land was such that ice in ridges, from frozen water and melted snow descending upon it, was habitually upon the sidewalk at that place; and other days might be mentioned, before or after the day in question, when such ice had been there. *Stone v. Hubbardston*, 100 Mass. 49, 57; *Fitzgerald v. Woburn*, 109 Mass. 204. A usual and habitual state of things, dependent upon natural causes and constantly producing the same results, has a legitimate tendency to show that the result was in existence at a particular time. Such evidence however would not be competent for the direct purpose of showing the shape or dimensions of the ridges of ice on the day when the accident occurred, unless it was so near in point of time, or accompanied with such other evidence of temperature and climate in the mean time as to furnish a presumption that its condition remained unchanged; and there is no reason to suppose that the evidence in this case was submitted to the jury for that purpose.

The measurement of the elevation and slope of the adjacent ground was so near in point of time that it was within the discretion of the court to admit it, there being no evidence of any intervening change.

In the opinion of a majority of the court the entry must be

Exceptions overruled.

NOTE BY THE REPORTER.— See note, *ante*, 58. The subject of the presumption of continuance was treated by John D. Lawson, in 28 *Albany Law Journal*, 284, as follows:

RULE I. Possession of either realty or personalty (a), non-possession or loss (b), debts (c), and other conditions of property or things (d), once presumed to exist, are presumed to continue until the contrary is shown.

(A.) 1. It is proved that at a given time B. was seized of certain land. The presumption is that such seisin continues and the burden is on him who alleges such disseisin. (1)

2. Certain land is devised to executors with power to sell. If no conveyance from them is shown, the presumption is that they did not execute the power.(2)

Where a person is proved to be the owner of personal property with the present right of possession, the presumption is that he continues to be owner with the right of possession, until there is evidence that he has parted with that ownership or right of possession, and the mere fact that the property is in the possession of another, with his consent, does not raise a legal presumption of change of title so as to shift the burden of proof upon the original owner to show that he retains his right of property and his right of possession thereon.(3)

Whenever the possession of one person is once shown to have been in subordination to the title of another, it will not be adjudged afterward adverse to such title without clear and positive proof of its having distinctly become so; for every presumption is in favor of the possession continuing in the same subordination to the title.(4)

(B.) 1. It is proved that a promissory note was given for consideration on November 2, 1848. In an action brought in 1854, the note is not produced, on the ground that it is missing and cannot be found after diligent search. Secondary evidence of the note may be given, for the presumption is that it still exists unpaid.(5)

2. In an action of replevin, it is proved that a tenant was evicted from his possession. The presumption is that he continues out of possession.(6)

3. The question is the admissibility of secondary evidence of a document. It is proved that two years ago diligent search was made for the document, but it could not be found. The presumption is that it is still lost, and secondary evidence is admissible (7)

A note once proved to have existed, it was said in case 1, is presumed to exist still, unless payment be shown or other circumstances from which a stronger counter presumption arises. It is not necessary for the creditor to prove that the debt is not paid or discharged. The burden of showing that it is rests on him who alleges it. And when diligent search has been made, unsuccessfully, by the person in whose hands the law presumes it to be, it is in judgment of law a lost paper, and secondary evidence is admissible of its contents.

(C.) 1. A statute authorizes the issuing of an attachment upon the filing of an affidavit showing the existence of the debt, etc., at the time of the application. An affidavit is made on October 5, showing a debt, etc., on that day, but is not filed till October 16, when the attachment is applied for. The presumption is that the debt was unpaid on the 16th, and attachment is properly issued.(8)

2. A debt was due from A. to B., in January, 1866. In November, 1865, A. admitted the debt, and in 1867, B. brought suit for it. The presumption is that the debt was still due.(9)

3. To prove a debt against a bankrupt, an entry in his books some months before the bankruptcy showing that he was indebted to the claimant in a certain sum is proved. The presumption is that the debt still continues.(10)

In case 1 it was said. "The affidavit having shown the debt to be existing

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and past due on the 5th of October, the legal presumption would follow that it remained due on the 16th of October. If a debt was shown to exist, but not due, after the day of its falling due, there might perhaps arise a legal presumption that the debtor had complied with his contract and paid as per agreement. But when it is once established that there has been a breach of contract, and the debtor has failed to pay at the right time, we are induced to think there is a fair legal presumption arising that the debt continues due and unpaid until something is shown to the contrary, or there is such lapse of time as to raise a contrary presumption."

In case 2 it was argued that the presumption was that the debt was paid when it became due. But the court said: "The fact that the debt had not become payable at the time the defendant had admitted its existence does not take the case out of the general rule. Payment being an affirmative fact to be done or performed by the defendant was for the defendant to prove."

The payment of a debt is evidenced by a receipt under receipt under seal — which is conclusive, making an estoppel — or a simple receipt which is *prima facie* evidence and rebuts the presumption of the continuance of the debt. Other circumstances which render the payment probable may also rebut the presumption — as for example, the settlement of accounts between the parties subsequent to the accruing of the debt, in which settlement no mention of the debt is made, (104) or a receipt for subsequent debts.(11)

(D.) 1. Goods were delivered in a good condition to A., a carrier, who delivered them at the end of his route to B., another carrier. At the end of B.'s route they were discovered to be damaged. In an action against B., *held*, that the presumption was that he received them in good condition, and the burden was on him to show that he did not.(12)

2. A vessel was proved to be seaworthy (as to chains, cables, etc.) when she left port in June, 1835. On December 15th she was wrecked, and arrived in port December 24th without sufficient cables, etc. The presumption is that she was sufficiently equipped on December 15th.(13)

3. A guest sued an innkeeper for the loss of packages containing money and securities of great value, which he had given, sealed in an envelope, to his clerk, to be deposited in the safe. The innkeeper denies that the envelope contained that amount of money. It is proved that shortly before that time the guest was seen with this money in his possession. *Held*, that the presumption was that the guest had such money at the time he alleged he had given it to the clerk.(14)

4. It is shown that a decree in chancery was rendered at a certain time. There is no evidence that it has been reversed or annulled. The presumption is that it is still in force.(15)

5. The question was whether a certain custom existed in the year 1840. The jury found that the custom existed in 1689, without more. *Held*, that the presumption was that the custom existed in 1840.(16)

"The property," it was said in case 1, "was placed in the hands of the Western Railroad Company in good order and condition, and until the contrary is shown must be presumed to have continued in that condition while in the possession of that company. It was delivered by the defendant, after being

transported over its road from Albany to Rochester, in a damaged condition, and the further presumption naturally follows that it received the injury while in the possession of the defendant. The general rule is that things once proved to have existed in a particular state, are to be presumed to have continued in that state, until the contrary is established by evidence either direct or presumptive. Unless the rule is to be applied to goods delivered, to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point or in the hands of which company the injury happened. But give to such party the benefit of the presumption that the goods he has delivered in good order in such case continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. The burden is then shifted upon the latter company, of proving that such goods came to its possession in a damaged condition, by way of defense. This proof the latter company can always make, much more easily and readily than the converse can be proved by the owner."

"When you prove," it was said in case 3, "that shortly before the 30th of April, the plaintiff had in his possession the particular drafts which he claims to have deposited, and the particular bills of \$1,000 and \$100 which he also claims to have deposited, some links in the chain are furnished. Their strength depends upon their nearness and relation to the transaction. If A., at seven o'clock, had seen this envelope and its contents with the plaintiff, and B., at five minutes past seven, had seen him make the deposit, I think the two could, by the inference of the jury, be connected together, although there was an interval when he was not within the sight of either. There is a legal presumption of continuance. A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty years since justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence. This analogy is fairly applicable to the present case and justifies the admission of this evidence."

"The finding of the jury," said Lord DENMAN in case 5, "that the custom had existed since 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show that it had been legally abolished.

RULE II. Domicile, residence or non-residence (a), solvency or insolvency (b), infancy (c), partnership (d), the holding of an office (e), authority to do an act (f), and other relations of persons or things (g), once shown to exist are presumed to continue until the contrary is proved.

(A.) 1. An action is brought in Arkansas, in 1841, by B. against P. It is proved that P. resided, in 1824, in Indiana. The presumption is that P. still resides there (17)

2 B., an inhabitant of the town of G, Massachusetts, conveyed his farm on April 1st, and on the twenty-seventh of that month went with his family to his brothers, in the town of T., where he remained until several days after May 1st, returning then to G., and removing on the 27th of May to Illinois. The presumption is that B. had not changed his domicile in G. on May 1st (18).

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3. To except an action on a contract from the bar of the statute of limitation it is necessary to prove that the defendant was a non-resident at the commencement of the suit. It is proved that he was a non-resident at the time the contract was made. The presumption is that he continued a non-resident, and throws the burden on him to show that he has been within the State a sufficient length of time to create a bar under the statute.(19)

4. Evidence by deposition is allowed to be taken where the witness is more than thirty miles of the place of trial, and unable to attend court. Before the trial the deposition of H. is taken for this cause. Subsequently when it is offered on the trial, it is alleged that H. is now in town and able to attend. The burden of proving this is on the party alleging this.(20)

"It is necessary," said Lord WESTBURY in a leading English case, "in the administration of the law, that the idea of domicile should exist and the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile therefore is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place."(21)

And Lord CRANWORTH added. "It is necessary to bear in mind that a domicile, though intended to be abandoned, will continue until a new domicile is acquired, and that a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but also until this intention has been carried out by actual residence there."(22)

(3.) 1. A. is proved to be in solvent circumstances on a certain day. A. is presumed to continue solvent until the contrary is proved.(23)

2. An action is brought on a promissory note and it is proved that the maker was insolvent at its maturity. The presumption is that he was insolvent when the action was brought.(24)

(4.) 1. A. brings an action in his own name to cancel a deed executed during his infancy. There is no allegation that he has attained his majority before commencing the action. The presumption is that A. is still an infant.(25)

2. In a settlement case it is proved that a son is over age. It is nevertheless presumed that he continues unemancipated as in the days of his infancy, unless there is evidence to the contrary.(26)

"The counsel for plaintiff claims," it was said in case 1, "that the presumption of law is that a party commencing his action in court is of full age, and entitled to maintain the action in his own name, until the contrary is shown. In most actions this is true, but the case at bar forms an exception. For the whole cause of action in this case is based upon an act done by the plaintiff during infancy. And the plaintiff being in court is compelled to plead that the act was done during his infancy. The age of the plaintiff at the time of the execution of the deed, is not stated, nor is there any thing in the complaint from which the court can infer that the plaintiff has attained his majority. The nature of the relief he seeks requiring the plaintiff after he appears in court to show himself a minor at the time of doing a certain act, the presumption is that such condition continues until the plaintiff himself negatives it."

(D.) A partnership brings an action on a note; it is contended that the plaintiffs are not partners. It is proved that three years previous they were partners. The presumption is that they continue to be so.(27)

In case 1 it was said: "The evidence of a joint interest in the plaintiffs was sufficient *prima facie*. It was shown that they were partners in business two or three years previous. The witness stated that he had frequently done business with them as partners and had settled with them as such some two or three years since. There was no evidence of any change or dissolution of partnership, and the presumption was that they were still partners."

(E.) A. is indicted for libelling B., in his capacity of public officer. It is proved that previous to the publication of the libel, B. held a public office. The presumption is that B. continued to hold it at the time of the publication.(28)

(F.) 1. The authority of a minor son to bind his father by contract is shown to exist in 1845. A year later the son makes a contract which the father contests. The presumption is that the son had authority to bind him at this time.(29)

(G.) 1. A. sues B. for two weeks' board. It is proved that for a year and up to the commencement of these two weeks, B., who was A.'s father, had lived with him and A. had not claimed any board. The presumption is that the parties were living together during the two weeks on the same terms.(30)

2. In Alabama, in 1855, the stockholders of a corporation are not competent witnesses in an action by or against it. An action is brought by the W. company, and one Y. is offered as a witness. There is evidence that Y. was a stockholder in the W. company in 1850. *Held*, that the presumption is that Y. is a stockholder now, and he is incompetent.(31)

So the continuance of a state of peace in a country, or a state of war, (32) and the continuance in force of public treaties, are presumed.(33)

And a state of government once proved to exist is presumed to continue until the contrary is shown.(34)

So a corporation once proved to exist is presumed to continue until the contrary is shown.(35)

In *Donahue v. Coleman*, 49 Conn. 464, it was said: "It is a general rule that a personal relation or an existing state of things, when once established by proof, is presumed to continue till the contrary appears.

"But the presumption is merely one of fact, and its effect depends upon the extent to which the quality of permanency enters into the nature of the matter in question. For this reason such a presumption must in some cases be confined to a limited period.

"Thus where a debtor went into bankruptcy at a certain date, the inference of continued bankruptcy five months afterward would be slight, but it would be legitimate evidence to be weighed by the jury.

"And in the absence of all evidence on the subject this presumption, though slight, would be controlling."

Where it is shown that a person was residing at a certain place at a certain time, the ordinary presumption is that such residence was a continuing residence. For what period of time such presumption would last must depend upon all the associated circumstances. *Greenfield v. Camden*, 74 Me. 56.

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When the personal property is shown to be the property of a party prior to his death. *Held*, that the law would presume, in the absence of any evidence to the contrary, that it continued to be his up to the time of his death. *Hanson v. Chratovich*, 18 Nev. 895.

(1) *Brown v. King*, 5 Metc. 173 (1842); *Sullivan v. Goldman*, 19 La. Ann. 12 (1867); *Lepori v. Todd*, 32 N. J. L. 128 (1866); *Currier v. Gale*, 9 Allen, 523 (1835); *Rhons v. Gale*, 12 Minn. 54 (1866); *Gray v. Finch*, 23 Conn. 513; *Winkley v. Kalme*, 38 N. H. 206 (1855); *Pickett v. Packham*, L. R., 4 Ch. App. 190 (1868).

(2) *Jackson v. Potter*, 4 Wend. 672 (1830).

(3) *Wells, C. J.*, in *Magee v. Scott*, 9 Cush. 146 (1851).

(4) *Hood v. Hood*, 2 Grant's Cas. 229 (1858).

(5) *Bell v. Young*, 1 Grant's Cas. 175 (1854).

(6) *Saunders v. Springsteen*, 4 Wend. 429 (1830).

(7) *Poe v. Dorrah*, 20 Ala. 289 (1856).

(8) *O'Neil v. New York, etc., Mining Company*, 3 Nev. 141 (1867).

(9) *Farr v. Payne*, 50 Vt. 615 (1868).

(10) *Jackson v. Irwin*, 3 Camp. 48 (1809).

(10½) *Cotseil v. Budd*, 1 Camp. 27.

(11) *Best Ev.*, § 406.

(12) *Smith v. New York Central R. Co.*, 43 Barb. 235 (1864).

(13) *Martin v. Fishing Ins. Co.*, 20 Pick. 389 (1838).

(14) *Wilkins v. Earle*, 44 N. Y. 172 (1870).

(15) *Murphy v. Orr*, 32 Ill. 499 (1868). But see *Bacon v. Smith*, 2 La. Ann. 441 (1867).

(16) *Scales v. Key*, 11 Ad. & Ell. 819 (1840).

(17) *Prather v. Palmer*, 4 Ark. 456 (1841); *Inhabitants v. Inhabitants*, 6 Allen, 506 (1832).

(18) *Kilburn v. Bennett*, 3 Met. 199 (1841).

(19) *State Bank v. Searsell*, 16 Ala. 616 (1851).

(20) *Brown v. Burnham*, 23 Me. 38 (1848).

(21) *Bell v. Kennedy*, L. R., 1 Sc. App. 380 (1866).

(22) And see as to the presumption of continuance of domicile, residence and non-residence, *Daniels v. Hamilton*, 52 Ala. 105 (1875); *Walker v. Walker*, 1 Mo. (App.) 404 (1875); *Nixon v. Palmer*, 10 Barb. 175 (1850); *Church v. Rowell*, 49 Me. 367 (1861); *Littelfield v. Inhabitants*, 50 Id. 475 (1862); *Goldie McDonald*, 78 Ill. 605 (1875).

(23) *Walrod v. Ball*, 9 Barb. 271 (1850).

(24) *Mullen v. Pryor*, 12 Mo. 307 (1848).

(25) *Irvine v. Irvine*, 5 Mum. 61 (1800).

(26) *Re Lilleshall*, 7 Q. B. 158 (1845).

(27) *Cooper v. Dedrick*, 22 Barb. 516 (1856), and see *Anderson v. Clay*, 1 Stark. 405 (1810); *Clark v. Alexander*, 9 Scott N. R. 161 (1844).

(28) *R v. Budd*, 5 Esp. 230.

(29) *McKenzie v. Stevens*, 19 Ala. 602 (1851); *Ryan v. Sanna*, 12 Q. B. 460 (1848).

(30) *Eames v. Eames*, 41 N. H. 177 (1860).

(31) *Montgomery, etc., Plank Co. v. Webb*, 37 Ala. 618 (1855). Marriage is an illustration of this rule, and it is held that an adulterous intercourse once established is presumed to continue. *Smith v. Smith*, 4 Paige Ch. 423 (1834).

(32) *Covert v. Gray*, 34 How. Pr. 450 (1866).

(33) *Penple v. McLend*, 1 Hill, 407 (1841).

(34) *Gelston v. Hoyt*, 1 Johns. Ch. 543 (1815).

(35) *People v. Manhattan Co.*, 9 Wend. 351 (1822).

WILLIAMS V. CHURCHILL

(187 Mass. 242.)

Master and servant — new employment — duty to warn.

The defendant, owner and master of a steam-tug, ordered the cook to go forward and handle the bow line, and he got entangled in it and was hurt. He was usually employed at the stern, and the employment in question was more dangerous, and the defendant did not warn him, but urged him to the duty with an oath. But the plaintiff was nineteen years old, had lived at the seashore all his life, and had been to sea three summers, and on the tug four months. *Held*, that a verdict for the defendant must stand.*

ACTION for personal injury by negligence. The opinion states the facts. The defendant had judgment below.

H. W. Chaplin, for plaintiff.

C. T. Russell & W. E. Russell, for defendant.

HOLMES, J. This action is brought by the cook of a steam-tug against the owner of the tug, who was also its master, to recover for personal injuries caused by the plaintiff's getting entangled in the loose end of a line which he was engaged in making fast to a cleat toward the bow of his vessel. The bow-line was said to be more dangerous than the stern line; but this only means that the strain upon it was likely to be greater, and although it seems to have been more usual to employ the plaintiff at the stern, a part of his duty was to work on deck generally, and upon the whole evidence, we think it clear that the master had a right to send him to the bow-line, and that any dangers necessarily and universally incident to handling it were within the risks which the plaintiff assumed. It was broad daylight, and all the elements of the task and risk, including the tug's rate of speed, to which the plaintiff testified, were as visible to him as to any one.

It was urged that the plaintiff was under age and inexperienced, and that the behavior of the loose end of a taut rope was a hidden danger. But the plaintiff was over nineteen years old, had lived on the seashore all his life had been to sea three summers, and had

* See *Thompson v. Hermann* (47 Wis. 602), 32 Am. Rep. 784.

Williams v. Churchill.

been on this boat four months, the time which it took his brother to become familiar with the duties on board and to get promoted. Taking these facts, in connection with the nature of the employment which he had accepted, the master had a right to assume that the plaintiff knew how to handle a line, and to order him to do so without special warning or instruction.

This is not like *Wheeler v. Wason Manuf. Co.*, 135 Mass. 294. There the plaintiff was wholly new to the business, and there was evidence that there was a tendency in a warped board to spring back while being sawed, which was not obvious; and also that there was a natural tendency in inexperienced persons to put the hand behind the saw in such a way that if the board sprang, it would throw the hand upon the saw,— which was what the plaintiff did. In the present case, one witness says that there is a natural tendency to put the foot on the end of the rope, which would be dangerous; but there is no evidence that the plaintiff did so, and he must be taken to have known the danger.

It was suggested that the master should have handled the tug by stopping or backing it so as to relieve the plaintiff from his embarrassment; but assuming what he had a right to assume, there was no embarrassment until the plaintiff's foot was caught, and then it was too late. The harm was done in an instant, and it does not appear that the master knew it until it was over.

It was most pressed that the master confused and drove the plaintiff forward into the danger by saying, with an oath, "You won't get that rope fast," just as the rope began to render, that is, to slip on the cleat by jerks because of the strain upon it. But these words carried no specific or wrong direction as to the manner in which the plaintiff should act. They did not forbid his letting the rope go to get more slack, if that was proper. And we cannot think that a jury would be warranted in finding that an oath addressed to a sailor who knew what to do was sufficient to shift the responsibility for a misstep.

Verdict for defendant to stand.

COMMONWEALTH V. WRIGHT.

(1871 Mass. 260.)

Criminal law — lottery.

Where one chose a number and paid a certain sum, and the seller drew an envelope from a box full, containing a slip with many numbers on it, and if the number chosen was on the slip the buyer received a multiple of the sum paid, greater or less according to agreement, and if not he lost what he had paid; *held*, a lottery.*

CONVICTION of promoting a lottery. The opinion states the facts.

J. J. Gargan, for defendant.

E. J. Sherman, attorney-general, for Commonwealth.

HOLMES, J. The defendant has been convicted of setting up and promoting a certain lottery for money, and the only question raised by his exceptions is whether the jury were warranted in finding that a game popularly known as the policy or envelope game is a lottery, within the Pub. Stats., chap. 209, § 1.

There was evidence that the defendant carried on the game, and that the public were invited to attend and take part in it. The substance of the game, as described in the bill of exceptions, seems to be that any one wishing to play chooses a number and pays a certain sum for it, and that then the conductor of the game draws an envelope from a box full of them, which envelope contains a slip with many numbers upon it. If the number chosen is found among those upon the slip, the person who chose it receives a multiple of the sum paid by him, greater or less according to the odds agreed upon. If not, he loses what he has paid.

We assume that the numbers upon the slips are limited in some way, so that the chances of success may be exactly calculated. But the defendant's argument that therefore the game contained no element of chance may be dismissed with a word. The event is none the less uncertain, that the chances of the event are certain. The chances only represent the average of a long series of events.

* See *Hudelson v. State* (94 Ind 426), 48 Am. Rep. 171.

Murdock v. Boston and Albany Railroad Company.

The event does not appear to have been even mechanically certain, as the selecting the envelope seems to have been made arbitrarily, after payment. But if the choice of the number had also fixed the envelope, so long as the event could not be predicted by the party concerned, it would be uncertain, and depend on chance in the only sense which the law has to take into account. *Commonwealth v. Thacher*, 97 Mass. 583; *State v. Clarke*, 33 N. H. 329, 335.

Perhaps it is a little more difficult to show how the game is more than a wager. A bet however is usually executory on both sides isolated, and determined by events independent of any action of the parties, while in this game a price is paid for the chance of a prize, and it is determined by a mechanical device worked by the manager of the game according to a scheme held out to the public, whether he who pays the money is to have the price or nothing. It may be that the difference between this and a single wager on the cast of a die is only one of degree; but if so, the difference is sufficiently marked to warrant the finding of the jury. We cannot say, as matter of law, that the facts that the price was money and not specific, and that more than one could select the same number with the same result, prevented the game from being a lottery. It is a lottery according to the popular use of the word as shown by the dictionaries, according to history, to which lotteries with money prizes not specific have long been known, and according to the course of the decisions. *Wilkinson v. Gill*, 74 N. Y. 63; s. c., 30 Am. Rep. 264. See *State v. Lowell*, 39 N. J. L. 485, and cases cited in Bish. Stat. Crimes, § 952.

Exceptions overruled.

MURDOCK V. BOSTON AND ALBANY RAILROAD COMPANY.

(187 Mass. 283.)

Carrier — railroad — ticket — expulsion.

If the ticket-seller of a railroad company sells a punched ticket, assuring the purchaser that it is good, when in fact it is not, and the passenger is expelled for non-payment of fare, he may recover damages against the company.

Murdock v. Boston and Albany Railroad Company.

ACTION for expulsion from a railroad train. The head-note shows the facts. The plaintiff had judgment below.

A. L. Soule, for defendant.

R. M. Morse, Jr., and *H. L. Harding*, for plaintiff.

C. ALLEN, J. It appears that the defendant's agent and ticket-seller told the plaintiff that the two tickets would be good for a passage from Springfield to North Adams, and explained the meaning of the punched holes, and with a full understanding of exactly what the tickets were and of what the plaintiff wanted, sold them to him as tickets good for his contemplated trip. There was nothing on their face to show the contrary to the plaintiff, and he took and paid for them on the strength of these explanations and assurances of the ticket-seller. There was no mistake on the part of either as to where the plaintiff wished to go, or what terms were actually expressed upon the tickets, or what marks or punched holes they bore. The circumstances of there being two tickets, and of the holes in one of them, naturally induced inquiry by the plaintiff, and he had no reason to distrust the correctness of the explanations which were given to him. The ticket-seller assumed to know, and gave assurances which the plaintiff had a right to rely on, and which he did rely on. If when the conductor refused to accept the punched ticket, it had appeared on an inspection of it that there had been a mistake, and that it did not on its face purport to be good for a passage over that part of the defendant's road, and that the ticket-seller had delivered to the plaintiff a good ticket upon some other railroad, or to some place which had already been passed, when the mistake was discovered, and it was found that the plaintiff had through inadvertence accepted a ticket which on its face was plainly insufficient, then this case would have fallen within the doctrine of the recent decision in *Bradshaw v. South Boston Railroad*, 135 Mass. 407; s. c., 46 Am. Rep. 481, and it would have been the duty of the plaintiff to yield for the time being, and pay his fare anew, or withdraw from the car, unless a distinction should be taken between the rights of passengers upon steam railways and street railways, under such circumstances, a question which we do not now consider. See *Cheney v. Boston & Maine Railroad*, 11 Met. 121; *Yorton v. Milwaukee, Lake Shore*

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& *Western Railway*, 54 Wis. 234; s. c., 41 Am. Rep. 23; *Townsend v. New York Central & Hudson River Railroad*, 56 N. Y. 295; s. c., 15 Am. Rep. 419; *Petrie v. Pennsylvania Railroad*, 42 N. J. L. 449; *Dietrich v. Pennsylvania Railroad*, 71 Penn. St. 432; s. c., 10 Am. Rep. 711; *Frederick v. Marquette, Houghton & Ontonagon Railroad*, 37 Mich. 342; *McClure v. Philadelphia Wilmington & Baltimore Railroad*, 34 Md. 532.

But in the present case, such is not the position of the parties. As has been seen, the plaintiff not only was not guilty of any negligence in accepting his ticket, but he examined it carefully, saw everything there was on it, and received explanations of the meaning of the punched holes, and assurances that the two tickets, in the condition in which they were, would be good for the trip. In such a case, there being no mistake or inadvertence on his part in the respects mentioned, and the tickets which were delivered being in all particulars such as were intended to be delivered, and there being nothing which could be gathered by inspection to show that they were insufficient, and no notice of their insufficiency being given to the plaintiff by any body, or in any form, until he had already entered upon and partially accomplished his journey over the defendant's road, he might well insist upon being allowed to complete that journey. If the defendant's superintendent or president or both of them, had been standing by when the plaintiff purchased, his tickets, and had heard and assented to what was said by the ticket-seller, and if they also were under the same mistake as to the rules established for the guidance of conductors, the legal position of the plaintiff would hardly have been stronger than it is at present. It would still be the case that he took his tickets relying on the mistaken assurances of the defendant's agent in respect to their validity. If the defendant through any imperfection in its rules or methods, or any ignorance or violation of rules or instructions by its agents, has been led into any interference with the rights of the plaintiff under such circumstances, it must abide the consequences. To hold the contrary would be a burden upon passengers such as is called for by no reason of necessity or expediency.

On the other hand it is no more than a wholesome requirement that railway companies should be responsible in damages for the consequences of a mishap such as occurred in the present case. The conductor's explanation of the meaning of the two punched holes might or might not be correct; at any rate, their meaning

was purely arbitrary, and so far as the plaintiff could see, the conductor's interpretation was no more probable or intelligible than that given by the ticket-seller. The plaintiff had a right to act upon the explanations given to him at the time when he bought his ticket. The mistake was that of the ticket-seller, in supposing that the punched holes signified that the ticket had been used only to Chester, whereas in fact, according to the defendant's rules for the instruction and guidance of conductors, they signified that it had been used to Pittsfield, a station farther on. The offer of the conductor to give a receipt to the plaintiff for the additional fare which he demanded, stating the circumstances under which it was paid, so that the plaintiff might get back the money, if it should be found that his account of the purchase of the ticket was true, though showing good faith on the part of the conductor, did not have the effect to make it the legal duty of the plaintiff to pay the additional fare.

It follows that all the instructions requested were properly refused, except as modified by the presiding judge; and the instructions which were given were clearly and accurately expressed. *Murphy v. Old Colony & Newport Railway*, 106 Mass. 153; s. c., 8 Am. Rep. 305.

Exceptions overruled.

GRAY V. CHRISTIAN SOCIETY.

(137 Mass. 329.)

Religious society — expulsion.

A by law of a religious society provided that any member should be dropped from the list who had ceased to worship regularly with the society or had failed to contribute to the support of its worship for one year. *Held*, that a member could only be expelled by a vote of the society, after a hearing. (See note, p. 313.)

BILL to restrain sale of defendant's property. The opinion states the case. The plaintiff had a decree below.

D. B. Gove and L. M. Child, for defendants

W. E. L. Dillaway, for plaintiffs.

HOLMES, J. At a meeting of the Christian Society, held on October 12, 1881, a vote was passed to sell the society's house of worship and to remove elsewhere. At a meeting held on October 28 a motion declaring such sale inexpedient was defeated. Enough persons to have changed the result on each vote were present, who were opposed to the sale of the church and who wished to vote ; but they were prevented from voting by the presiding officer, acting in conjunction with the defendant Goodwin and others. The main question is whether these persons had a right to vote.

The answer depends upon the effect to be given to article 11 of the by-laws of the society, passed May 5, 1880. It is not now argued that the persons concerned did not become members of the society under the previous by-law of 1853, and we have no doubt that they did. The question is narrowed therefore to whether they have ceased to be members by force of the present article 11.

This article is as follows : " Any member who shall either cease to regularly worship with the society, or shall fail to contribute to the support of its public worship for the term of one year, shall have his or her name dropped from the list of members." The judge before whom the cause was tried ruled in terms that this was valid, and interpreted as we interpret it, we assume both that it was so and that it applied to existing as well as future members. *Taylor v. Edson*, 4 Cush. 522 ; *Dawkins v. Antrobus*, 17 Ch. D. 615, 634.

In *Taylor v. Edson* it was assumed, without argument or mention, that if the by-law there in question was valid and applied to existing members, the defendant did right in refusing to receive the vote of a person who had not paid his annual subscription of five dollars. The by-law provided that persons owning or hiring pews, who " shall subscribe and pay annually, for the support of public worship, a sum not less than five dollars * * * shall be deemed members of this parish and entitled to vote at the annual meeting of said parish, subsequent to such subscription and payment and during its continuance, and no longer " It might well be contended on this language that membership of the society was only from year to year and that payment of the subscription for the current year was a condition precedent to membership and the right

to vote. It will also be noticed that the sum to be paid was fixed and that therefore there could not ordinarily arise any question whether the condition had been complied with.

The defendant's by-law, on the other hand, does not create a membership from year to year, and a failure to contribute to the support of public worship for a year stands on the same footing as ceasing regularly to worship with the society, as a breach of a condition subsequent for which the "member" "shall have his or her name dropped from the list of members." By the very words of the by-law a membership is assumed to exist of which the party is to be deprived. He is to be deprived, once for all, by one act, that of dropping his name from the list. If there were no other ground for the conclusion this would be enough to satisfy us that membership was not determined by mere omission on the member's part. And if an act is necessary, it is clear that it must be a vote of the society, just as a vote of the society is necessary under article 10 for the approval of a member. No other person or body is empowered to do it; certainly not the moderator of a meeting. *Com. v. Pennsylvania Beneficial Institution*, 2 S. & R. 141; *Delacy v. Neuse River Nav. Co.*, 1 Hawks, 274, 279; s. c., 9 Am. Dec. 636; *Sibley v. Barteret Club*, 40 N. J. L. 295.

But again, the grounds on which a member is to be deprived of his membership are both of them indefinite, involving questions of more or less possible disputes of fact, and certain differences of judgment. Not only is the number of times a man has attended, or the amount he has contributed, to be settled, but then comes the question whether the facts amount to ceasing regularly to worship with the society, or to a substantial failure to contribute. These questions are not to be decided by a moderator when a person offers his vote. They are judicial questions, to be determined by the society, after giving the member notice and an opportunity to be heard. The necessity of complying with these requirements of common justice has been so uniformly asserted, that only a few cases need be cited, in addition to those last referred to, to show how unwilling courts have been to admit that charters, by-laws, or rules could be intended to deprive a man of his membership without a hearing. *Dean v. Bennett*, L. R., 6 Ch. 489; *Fisher v. Keane*, 11 Ch. D. 353, 359; 27 Eng. R. 586; *Queen v. Saddlers' Co.*, 10 H. L. Cas. 404; *Innes v. Wylie*, 1 Car. & K. 257, 263; *State v. Adams*, 44 Mo. 570, 586.

As there had been no hearing, and no vote of the society that their names should be dropped from the list, the persons who were prevented from voting were wrongfully prevented.

[Minor question omitted.]

Decree affirmed.

NOTE BY THE REPORTER.— See *Salé v. Fente, etc., O'hurch*, 49 Am. Rep. 186; *Gregg v. Mass. Med. Society* (111 Mass. 185), 15 Am. Rep. 24, *Loubat v. LeRoy*, 15 Abb. N. C., 1; to which Mr. Abbott appends an elaborate note; 27 Eng. R. 595.

In *Hutchinson v. Lawrence*, 67 How. Pr. 88, the plaintiff, a member of the New York Stock Exchange, an incorporated voluntary association, having been charged by a special committee of investigation, after taking voluminous testimony, with being guilty of improper practices, the governing committee of the exchange, who are empowered by its constitution to expel members adjudged to have been guilty of obvious fraud, preferred charges against him based upon the testimony thus taken. He was permitted to make statements and explanations before the investigating committee, and to cross-examine the witnesses produced. Then he appeared before the governing committee and read his defense at great length. At a subsequent meeting on June 6th, in his absence, two accusing witnesses were examined by the governing committee, who then negatived a proposition that these witnesses be brought again before them to be cross-examined by the accused member. *Held, first*, that though the governing committee is not bound on the trial of a member for misconduct by the ordinary rules which obtain in judicial proceedings, yet the court should interfere for the purpose of holding the association to a fair and honest administration of its rules. *Second*. The action of the governing committee on June 6th was not just or fair to the accused member in either a legal or equitable sense, and defendants should be restrained pending the action from asserting against plaintiff the resolution of expulsion passed upon him.

The court said : " In this case there is no appeal from the decision of the governing committee, such as existed in the case of *White v. Brownell*, 2 Daly, 329-336. In that case the learned justice, while admitting that courts should be careful not to interfere in the proceedings of such associations, evidently was of the opinion, that if the proceedings were erroneous and unjust, the plaintiff, after having exhausted his right of appeal, could resort to a court of equity for relief. There have been many decisions in the courts in which proceedings analogous to those now under review have been the subject of consideration by eminent judges, and in all such cases it will be found that great stress is laid in the opinion of the court upon the sacred right of an accused party to be fully informed of the charge which has been made against him and to be fully heard in his defense.

" In *Thorburn v. Barnes*, L. R., 2 Com. Pleas, 401, a case relating to an award, WILLES, J., says : ' It was certainly not put too high by Mr. Brett when he said that it is one of the first principles of justice that no man's rights shall be

adjudicated upon without giving him an opportunity of being heard in support of them.'

"BAYLEY, baron, in *Capel v. Child*, 2 Crompton & Jervis, 558, said: 'I know of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property, without his having an opportunity to be heard. There is the case of *King v. Benn & Church*, 6 T. R. 198, in which, where a warrant of distress, which is in the nature of an execution, had issued, not grounded on a previous summons, Lord KENYON laid it down most distinctly as an invariable maxim of our law, that no man shall be punished before he has had an opportunity of being heard.'

"In *Wood v. Wood*, L. R., 9 Exch. 194; s. c., 10 Eng. R. 372, which was a case where the plaintiff alleged that he had been wrongfully and improperly expelled from a mutual insurance company, Chief Baron KELLY said: 'This, then, is the great question in the case: Was the alleged act of expulsion void? It is contended for the plaintiff that the language of the rules gives an unconditional and absolute power to the committee to expel a member from the society, and I agree that if the committee in fact exercised their power under the rules, their decision could not be questioned; however unfounded the reasons for it may have been, it would have been final and could not be reviewed by any court. But they are bound, in the exercise of their functions, by the rule expressed in the maxim — *audi alteram partem* — that no man shall be condemned to consequences resulting from alleged misconduct unheard, and without having the opportunity of making his defense. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.'

'This case seems to be fully in point, inasmuch as it related to the expulsion of a member from a society, attached to the membership of which were valuable rights and privileges.

"Again while these proceedings are not to be governed by the strict rules which apply to actions at law or suits in equity, or even perhaps by the rules which obtain in regard to arbitrations, there is, I think, a strong analogy between the principles which govern in arbitrations and those which relate to proceedings of this character. In the case of *Sharpe v. Bickerdyke*, 3 Dow Rep. 102, Lord ELDON said that by the 'great principle of eternal justice which was prior to all these acts of *sederunt* regulations and proceedings of court, it was impossible an award could stand where the arbitrator heard one party and refused to hear the other; and on this great principle, and on the fact that the arbitrator had not acted according to the principles upon which he himself thought he ought to have acted, even if he decided rightly he had not decided justly, and therefore the award could not stand.'

"In the *Matter of Plews v. Muddleton*, 6 Adol. & Ell. (N. S.) 845, an award was set aside because the three arbitrators, after having determined within a small amount the sum to be paid, agreed to examine a witness separately, and did so. COLERIDGE, J., in that case says: 'To uphold this award would be to authorize a proceeding contrary to the first principles of justice. The arbitrators here carried on examinations apart from each other and from the par-

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ties to the reference, whereas it ought to have been conducted by the arbitrators and umpire jointly in the presence of the parties.'

"In *Oswald v. Grey*, 24 L. J., Q. B. 63, it was held that no usage can justify the arbitrators in hearing one party and his witnesses only, in the absence of and without notice to the other party.

'In *Walker v. Frohisher*, 6 Vesey, 63, an award was set aside, the arbitrator having received evidence after notice to the parties that he would receive no more, in which they acquiesced. In this case Lord ELDON says: 'A judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice, but upon general principles it cannot be supported.' This decision also seems peculiarly applicable to the averments contained in the joint affidavit of Messrs. Lummis and Eames, that the testimony given by Duff and Brouwer before the governing committee was not different in character or effect from that which these witnesses had given before the special committee of inquiry. Both of the affiants sat in judgment upon the plaintiff in this case, and it does not seem just or fair that they should take evidence in his absence, without notice to him, and determine that that evidence had no force or effect in producing the final result.

"In *Drew v. Drew*, 2 Macqueen's Cas. 1, it was held 'that an arbitrator greatly errs if he, in any of the minutest particulars, takes upon himself to listen to evidence behind the back of any of the parties to the submission. See particularly remarks of Lord Chancellor CRANWORTH, p. 9. In *Fisher v. Keane*, 11 Ch Div. 853; s. c., 27 Eng. R 526, it was held 'that the committee of a club, being a *quasi* judicial tribunal, was bound, in proceedings under their rules against a member of the club for alleged misconduct, to act according to the ordinary principles of justice, and are not to convict him of an offense warranting his expulsion from the club without giving him due notice of their intention to proceed against him, and affording him an opportunity of defending or palliating his conduct; and that the court will, at the instance of any member so proceeded against, declare any resolution passed by the committee without previous notice to him, based upon *ex parte* evidence, and purporting to expel him from the club, to be null and void, and will restrain the committee by injunction from interfering by virtue of such a resolution with his rights of membership.'

"The principle to be deduced from all these cases is that in every proceeding before a club, society or association having for its object the expulsion of a member, the member is entitled to be fully and fairly informed of the charge and to be fully and fairly heard

"In this case Hutchinson was not heard after Duff and Brouwer had been called in to satisfy members of the governing committee who were in doubt, even after hearing the report of the sub-committee and reading the testimony of Duff and Brouwer there given, after having heard Hutchinson's answer to the charge made in the report of the sub-committee. Various other questions were discussed upon the argument of this motion which I do not deem it necessary now to consider. It seems to me that the action of the governing committee of the stock exchange in examining Duff and Brouwer, after Hutchin-

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son had retired, upon points so vitally affecting his character, reputation and property, was not just or fair to him in either a legal or equitable sense ; that it was contrary to the rule which should obtain in all proceedings had in bodies such as the stock exchange, for the expulsion of members, and therefore I deem it my duty to continue the injunction heretofore granted until the cause can be tried See *Wood v. Wood*, L. R., 9 Exch. 190, *supra*."

WHITNEY V. ELIOT NATIONAL BANK.

(137 Mass. 351.)

Negotiable instrument — draft — assignment.

A sight draft payable to the order of a bank, directing the drawee to charge the amount to a certain account, is negotiable, and does not constitute an assignment of the fund.*

INTERPLEADER to determine ownership of a fund. The opinion shows the point.

F. Goodwin, for Eliot National Bank.

G. R. Swasey, for Dyer.

FIELD, J. The bill has been taken as confessed against Smith and Northam ; and it is manifest that upon the allegations of the bill, they are not entitled to the money. They sold the meal to Hatheway & Company ; but it does not appear that the title did not pass to Hatheway & Company by this sale, and no facts appear which give Smith, Northam & Company any lien upon the proceeds of the sale made by Hatheway & Company to Morrison. If the drafts or bills of exchange constitute an assignment of the debt due, or to become due, to Hatheway & Company from Morrison, Hatheway & Company received the two checks sent by Morrison to the use of the bank ; but if there has been no assignment, they received the checks to their own use, although they may be personally liable to the bank as drawers. The bank has acquired no additional rights to the money from the fact that Hatheway & Company placed the checks in the hands of the plaintiffs

* See *Saylor v. Bushong* (100 Penn. St. 23), 45 Am. Rep. 353.

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for the benefit of whom it might concern ; and under the facts in the case, the bank has lost none of its rights to the money in the hands of the plaintiffs, if it acquired any, by discounting the bills of exchange. The delivery of the checks to the plaintiffs was not an assignment to the bank. Hatheway & Company, having suspended payment, might well be in doubt whether the checks belonged to the bank, or to themselves, and might well hesitate whether to collect them and mingle the proceeds with their other assets, or to deliver them to the bank and thus perhaps run the risk of being refused a discharge in insolvency, if they became insolvent debtors. They therefore delivered the checks to the plaintiffs, in order that the rights of the different claimants to receive the proceeds of them might be determined by law.

The drafts or bills of exchange are in the ordinary form of negotiable sight bills, except that they each contain the direction to "charge the same to account of 250 bbls. meal ex schooner Aurora Borealis." This direction to charge the amount of the bills to a particular account, we think, does not make them payable conditionally, or out of a particular fund ; they are still payable absolutely, and are negotiable, and do not constitute an assignment of a particular fund, or of a part of a particular fund. *Robey & Co.'s Perseverance Iron Works v. Ollier*, L. R., 7 Ch. 695 ; s. c., 3 Eng. R. 571 ; *In re Entwistle*, 3 Ch. D. 477 ; s. c., 18 Eng. R. 633 ; *Griffin v. Weatherby*, L. R., 3 Q. B. 753 ; *Banner v. Johnston*, L. R., 5 H. L. 157 ; *Haussoullier v. Hartsinck*, 7 T. R. 733 ; *Macloed v. Snee*, 3 Str. 762 ; *Wells v. Brigham*, 6 Cush. 6 ; *Redman v. Adams*, 51 Me. 429 ; *Corbett v. Clark*, 45 Wis. 403 ; *Coursin v. Ledlie*, 31 Penn. St. 506 ; *Kelley v. Brooklyn*, 4 Hill, 263 ; *Early v. McCart*, 2 Dana, 414 ; *Spurgin v. McPhosters*, 42 Ind. 527.

In *Brill v. Tuttle*, 81 N. Y. 454 ; s. c., 37 Am. Rep. 515, some of the New York cases are reviewed, and it is held, that when the language is ambiguous and the order not negotiable, "the attendant circumstances may be shown to determine the intention and understanding of the parties," but the case does not purport to be an authority, if the order is in form a negotiable bill of exchange. See *Wheeler v. Souther*, 4 Cush. 606.

In the case at bar, the two drafts were drawn on different days, and although taken together, they are equal to the whole amount due, or to become due, from Morrison for five hundred barrels of meal, each is drawn for a certain sum of money, which is in fact

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one-half of the debt, and is to be charged to the account of two hundred and fifty barrels of the meal. Either standing alone would not, in an action at law, constitute an assignment of the sum of money expressed in it, as it is for a part of the debt due from Morrison. *Gibson v. Cooke*, 20 Pick. 15; s. c., 32 Am. Dec. 194; *Palmer v. Merrill*, 6 Cush. 282; *Bullard v. Randall*, 1 Gray, 605; *Dana v. Third National Bank*, 13 Allen, 445; *Carr v. Security National Bank*, 107 Mass. 45; s. c., 9 Am. Rep. 6. The dictum in *Gibson v. Cooke*, *ubi supra*, that "a draft by the creditor on his debtor in the form of a bill of exchange, to the amount of the debt, or the whole fund in his hands, is a good and valid assignment of the debt, or fund," is qualified in *Dana v. Third National Bank*, as perhaps meaning "a draft on a particular fund," and so qualified, is said to be "undeniably correct." If under this view of the law, the first draft, on being discounted, assigned to the bank no part of the debt, the second draft would not be an order for the whole amount of the debt, and it is difficult to see how, taken together, the drafts would, in an action at law, constitute an assignment of the whole debt; but we do not intend to put the decision on this ground, or to decide whether in equity there may not be an assignment of a part of a debt. See *Exchange Bank v. McLoon*, 73 Me. 498; s. c., 40 Am. Rep. 388. For the reason given in the cases first cited, we think these drafts are negotiable bills of exchange, not payable out of a particular fund, and do not constitute an assignment of the fund.

[Minor question omitted.]

For these reasons, a majority of the court are of opinion that there must be a decree that the money in the hands of the plaintiffs be paid to the assignee in insolvency.

So ordered.

COWLEY V. PULSIFER.

(137 Mass. 302.)

Libel and slander — privileged publication — petition for removal of attorney.

The publication in a newspaper of the contents of a petition for the disbarment of an attorney, filed in vacation and not presented or docketed, is not privileged.

Cowley v. Pulsifer.

LIBEL. The opinion states the case. The defendant had judgment below.

J. Cowley, pro se.

C. Lincoln, for defendants.

HOLMES, J. This is an action against the owners and publishers of the Boston *Herald* for a libel printed in that newspaper. The alleged libel was a report of the contents of a petition for the removal of the plaintiff, an attorney at law, from the bar. The report was fair and correct, but the petition included allegations which would be actionable unless justified. In their answer the defendants rely upon privilege; and the main question raised by the plaintiff's exceptions is whether the publication was privileged, as ruled by the court below.

The petition had been presented to the clerk of the Supreme Judicial Court for the county of Middlesex in vacation, had been marked by him, "Filed February 23, 1883," and then or subsequently had been handed back to the petitioner, but it did not appear that it ever had been presented to the court or entered on the docket.

We are of opinion that the foregoing circumstances do not constitute a justification and that the defendants do not bring themselves within the privilege admitted by the plaintiff to attach to fair reports of judicial proceedings, even if preliminary or *ex parte*.

No binding authority has been called to our attention which precisely determines this case, and we must be governed in our conclusion mainly by a consideration of the reasons upon which admitted principles have been established.

We begin by recalling the familiar distinction between the privilege of the petitioner in respect of filing his petition and the privilege of the same or any other person in respect of subsequently printing it in the newspapers, or otherwise publishing it to strangers who have no interest in the matter. This distinction we believe has always been recognized, both before and since the case of *Lake v. King*, 1 Saund. 120, 133; s. c., 1 Lev. 240; *Weston v. Dobinet*, Cro. Jac. 433; *Rex v. Creevey*, 1 M. & S. 273, 280; *M'Gregor v. Thwaites*, 3 B. & C. 24, 31, 35; *Flint v. Pike*, 4 B. & C. 473, 481; *Commonwealth v. Blanding*, 3 Pick. 304, 317. We therefore lay on

one side all cases which only tend to show that the petitioner incurred no liability by handing his petition to the clerk, and by whatever publication that involved, and we shall assume, for the purposes of this case, that he incurred no liability by so doing.

The privilege set up by the defendants is not that which attaches to judicial proceedings, but that which attaches to fair reports of judicial proceedings. Now what is the reason for this latter? The accepted statement is that of Mr. Justice LAWRENCE in *Rez v. Wright*, 8 T. R. 293, 298: "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings." See also *Davison v. Duncan*, 7 El. & Bl. 229, 231; *Wason v. Waller*, L. R., 4 Q. B. 73, 88; *Commonwealth v. Blanding*, 3 Pick. 314; s. c., 15 Am. Dec. 214.

The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which publicity gives for the proper administration of justice. It used to be said sometimes that the privilege was founded on the fact of the court being open to the public. PATTESON, J., in *Stockdale v. Hunsard*, 9 A. & E. 1, 212. This no doubt is too narrow, as suggested by Lord Chief Justice COCKBURN in *Wason v. Waller*, *ubi supra*; but the privilege and the access of the public to the courts stand in reason upon common ground. *Lewis v. Levy*, El., Bl. & El. 537, 558. It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration

of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. It would be carrying privilege further than we feel prepared to carry it, to say that by the easy means of entitling and filing it in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity. See *Sandford v. Bennett*, 24 N. Y. 20, 27; *Lewis v. Levy*, *ubi supra*; *Barber v. St. Louis Dispatch Co.*, 3 Mo. App. 377.

We waive consideration of the tendency of a publication like the present to create prejudice and to interfere with a fair trial. *Barrows v. Bell*, 7 Gray, 302, 312, 316; *In re Cheltenham & Swansea Railway Carriage and Wagon Co.*, L. R., 8 Eq. 580; *Tichborne v. Mostyn*, L. R., 7 Eq. 55 n.; *Read & Huggonson's case*, 2 Atk. 469; s. c., *nom. Roach v. Garvan*, 2 Dick. 794. Neither shall we discuss the question what liminations there are, if any, to the requirement that the proceeding must have been acted on and decided. *Barrows v. Bell*, *ubi supra*; *Delegal v. Highley*, 3 Bing. N. C. 950, 963. For apart from the distinction between what takes place in open court and the contents of papers filed in the clerk's office, it might be said that these considerations apply with equal force to a report of proceedings in court published from day to day as they take place, and that nevertheless it has been held that reports might be so published, and that it is not necessary to wait until a trial is completed. *Lewis v. Levy*, *ubi supra*. See *Unill v. Hales*, 3 C. P. D. 319, 325; s. c., 30 Eng. R. 188. The practice of publishing reports in this manner is universal with us, and we may concede that it might happen that the proceedings of the first day stopped with the reading of the pleadings, or in this case, of the petition, and that a fair report under those circumstances would be privileged, without considering whether a publication of the first day's proceedings could be made actionable by relation if the subsequent ones should be omitted.

For the purposes of the present case it is enough to mark the plain distinction between what takes place in open court and that which is done out of court by one party alone, or more exactly, as we have already said, the contents of a paper filed by him in the clerk's office. This distinction, although not established by them, derives an indirect sanction from the cases which have turned on the question whether the proceeding — for instance, the examination of a bankrupt — took place in a public court. *Rynalls v.*

Leader, L. R., 1 Ex. 296 ; *Lewis v. Levy*, *ubi supra*. See also *Fleming v. Newton*, 1 H. L. Cas. 363, 378.

It is further to be noticed that the language of Chief Justice SHAW in *Barrows v. Bell*, *ubi supra*, clearly implies that the privilege claimed by the defendants does not protect them. He says that a fair statement of the proceedings, "when they have been acted upon and decided, made with an honest view of giving useful information, and where the publication will not tend to obstruct the course of justice and interfere with a fair trial, is not a libellous publication." In the English Chancery it is held to be a contempt of court to publish a pleading of one party in a newspaper, or, it would seem, the whole proceedings, before the matter has come on to be heard. *In re Cheltenham & Swansea Railway Carriage and Wagon Co.*, *ubi supra* ; *Bowden v. Russell*, 46 L. J. [N. S.] Ch. 414, 416 ; *Cann v. Cann*, 3 Hare, 333, n. ; s. c., 2 Ves. Sr. 520 ; 2 Dick. 795. A contempt of court cannot be privileged, and we see no reason to doubt that an action could be maintained for such a publication. *Bowden v. Russell*, *ubi supra*. Nor do we see any reason for confining the liability to proceedings in equity. "If one exhibit a scandalous bill, if the court had jurisdiction of such matters, an action lies not ; otherwise it is, if the court have not jurisdiction ; or having, if the party publish his bill abroad, the said bill being false." *Weston v. Dobinet*, *ubi supra*. See further *Delegal v. Highley*, and *Barber v. St. Louis Dispatch Co.*, *ubi supra*.

We have placed only a qualified reliance on the cases cited, because some of them were decided too early to be conclusive, and those on the question of contempt have been placed on grounds not perhaps convincing with regard to the present question. But they lend strong support to our decision.

It may be objected that our reasoning tacitly assumes that papers properly filed in the clerk's office are not open to the inspection of the public. We do not admit that this is true, or that the reasons for the privilege accorded to the publication of proceedings in open court would apply to the publication of such papers, even if all the world had access to them. But we do not pause to discuss the question, because we are of opinion that such papers are not open to public inspection. A different conclusion might be drawn from a hasty reading of Pub. Stats., ch. 37, § 13, but the county records or files, which are there ordered to be opened for public inspection and examination and of which any person may take copies, are the

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records and files of the county, not of the courts of the Commonwealth within and for that county. We see no reason to suppose that the public or general statutes were intended entirely to change the scope of the original enactments which they embodied. These were the statutes of 1851, ch. 161, and 1857, ch. 84, both of which will be seen on inspection to have no reference to the records of the courts.

We have assumed, for the purposes of this discussion, that the petition was rightly filed, and that the defendants were entitled to any benefit which they might derive from that circumstance. But we do not mean to intimate any opinion one way or the other upon the question.

Exceptions sustained.

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(137 Mass. 494.)

Arbitrator — attorney — liability for conspiracy.

An arbitrator is not liable to an action by one party for fraudulently conspiring with the attorney of the other party to induce the other arbitrators to join him in an unjust award, but the attorney is liable, although the judgment on the award remains unreversed.

ACTION of damages. The head-note shows the case. The defendants had judgment below.

J. L. Thorndike and W. E. Welch, for plaintiff.

C. F. Donnelly, for defendants.

MORTON, C. J. The principle is too well settled to require discussion, that every judge, whether of a higher or a lower court, is exempt from liability to an action for any judgment given by him in the due course of the administration of justice. This immunity is founded upon considerations of public policy, and as stated by Chief Justice KENT, in *Yates v. Lansing*, 5 Johns. 282, and 9 Johns. 395, "has a deep root in the common law." It is of the highest importance that judges and others engaged in the administration of

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justice should be independent, and should act upon their own free and unbiased convictions, uninfluenced by any apprehension of consequences. The reasons for the principle are more fully stated in the opinion of Chief Justice SHAW in the case of *Pratt v. Gardner*, 2 Cush. 63, to which we refer. See also *Bradley v. Fisher*, 13 Wall. 335. A similar immunity extends to jurors. The question whether a like immunity extends to arbitrators seems never to have arisen in this Commonwealth.

An arbitrator is a *quasi* judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him. *Jones v. Brown*, 54 Iowa, 74; s. c., 37 Am. Rep. 185. It follows that this suit cannot be maintained against the defendant Sprague, and his demurrer must be sustained.

The demurrer of the defendant O'Brien presents a different question. The immunity from actions extended to Sprague on grounds of public policy does not protect O'Brien. If a lawyer who brings a suit, procures an unjust judgment against his adversary, by suborning witnesses, by bribing the judge, jury, or arbitrators, or by other corrupt and illegal practices, we know of no legal reason why he should not be responsible for his illegal acts to the party injured. He is not exonerated, because for reasons which do not apply to him, a joint tortfeasor, cannot be reached. *Rice v. Coolidge*, 121 Mass. 393, s. c., 23 Am. Rep. 279.

The defendant contends that the judgment founded on the award cannot be impeached; and that it is conclusive on the plaintiff, and while unreversed, prevents him from maintaining this action. This argument is founded upon a misapprehension of the effect of the former judgment. It is true, as a rule, that an unreversed judgment is conclusive between the parties and their privies; and the principle goes so far that one cannot sustain an action against another for obtaining a judgment against him by means of conspiracy and fraud, if he had an opportunity to be heard at the trial of the cause in which the judgment was obtained. This would be to re-try the merits of the former suit in an action between the same parties. *Rice v. Coolidge, ubi supra*. But the parties in this suit are not the same as in the former suit. The plaintiff in this

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suit does not impeach the former judgment ; on the contrary, the plaintiff relies upon it, and the fact that it is conclusive as between it and Hogan, as the foundation of its claim against the defendant O'Brien. The plaintiff may have to try in this suit one of the issues involved in the former suit, namely, the extent to which Hogan was injured, but this furnishes no reason against maintaining this suit. The case before us is like that of a man, who having employed an attorney at law to defend a suit, afterward sues him for negligently or corruptly permitting an unjust judgment to be entered against him. There is no doubt that such a suit may be maintained, though it may involve the trial of the merits of the former suit. *Godefroy v. Jay*, 7 Bing. 413. Pub. Stats., ch. 159, § 39. The declaration in the case at bar in substance charges O'Brien with fraudulently and corruptly conspiring with Sprague, one of the arbitrators, and by fraudulent means inducing him and the other arbitrators to award, in favor of Hogan against the plaintiff, a much larger sum than he was entitled to receive. We are of opinion, that for such fraudulent and corrupt acts, O'Brien is liable to an action.

It is but fair to say, that though we consider the facts stated in the declaration as true for the purposes of a hearing upon the demurrer, yet they have not been proved, and no evidence has been given in support of them.

Demurrer of Sprague sustained.

Demurrer of O'Brien overruled.

WAMSUTTA MILLS V. OLD COLONY STEAMBOAT COMPANY.

(137 Mass. 471.)

Ship and shipping — general average — fire in vessel at wharf, extinguished by city authorities.

If a fire in a vessel at a city wharf is extinguished by the city fire department, acting under municipal authority and not at the request or direction of the shipmaster, the cargo saved is not liable to contribute to a general average loss.

ACTION for neglect to make a general average adjustment. The head-note and opinion show the case. The defendant had judgment below.

C. T. Russell & C. T. Russell, Jr., for plaintiff.

J. H. Benton, Jr., for defendant.

FIELD, J. We express no opinion whether, if this be a general average loss, an action can be maintained for the negligence alleged in the declaration. It has been judicially decided that such an action can be maintained, in *Crooks v. Allan*, 5 Q. B. D. 38; s. c., 29 Eng. R. 164, and in *Gillett v. Ellis*, 11 Ill. 579; but the decision in *Crooks v. Allan* is by a single justice and no cases are cited in the opinion. We find it unnecessary to determine whether these cases ought to be followed, or to decide what the rule of damages is if an action lies.

The gist of the action is negligence in delivering the cargo without an adjustment of the loss as a general average loss, and without taking security for the payment of the contributive shares. The fundamental question is, was this a general average loss? Although the steamship was at her wharf the maritime adventure was not at an end; the steamship was still bound to the cargo for its safe delivery; and the cotton, on account of which the suit has been brought, was undischarged.

It must be considered that it is now established that damage to unburnt portions of the cargo, caused by water intentionally used to extinguish a fire in a ship, is of the nature of a general average loss. *Whitecross Wire Co. v. Savill*, 8 Q. B. D. 653; *Nelson v. Belmont*, 21 N. Y. 36, and 5 Duer, 310; *Nimick v. Holmes*, 25 St. 366; *Gregory v. Orrall*, 8 Fed. Rep. 287.

The defense is that the fire was extinguished, not by the master or by any person in charge of the steamship or her cargo, but by the chief engineer of the fire department of the city of New Bedford, under his authority to extinguish fires within the city; and that it was necessary to do what he did, not only for the purpose of saving the ship and cargo, but for preventing the spread of the fire to buildings and other property in the city.

The right to extinguish fires in the city of New Bedford is a part of the police power of the Commonwealth. It may be exercised

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not only without the consent of the owner of the property on fire, but against his will. No one has a right to have his property burn if thereby the property of others is endangered. Fire departments are established for the efficient suppression of dangerous fires, and the chief engineer is the head of the department, and his authority extends over all property within the municipality, the burning of which is dangerous. In taking possession of property for the purpose of extinguishing a fire that threatens to spread to other property, the chief engineer does not act as agent of the owner, but under a paramount right.

If indeed the fire does not endanger the property of others, he may act merely as the agent of the owner; but if the safety of other property is imperilled, he must act under his public responsibility. If persons are employed to render a service the service is paid for by those who employ them, but the members of a fire department in the ordinary performance of their duties are public officers and are paid by the municipality. It is clear in the case at bar that the chief engineer and his men were not employed to extinguish the fire by any person lawfully in charge of the steamship; but that they acted wholly under their public employment. Although what they did was done without objection by the mate, or by the master after he arrived, yet they did not act under the direction of either master or mate. Suppose the chief engineer had brought a libel against the steamship and cargo for salvage, could he have maintained it for services in putting out the fire, without regard to his services in pumping out the steamer after she sank? We think not. *The Mary Frost*, 2 Woods, 306. •

To constitute a general average loss, there must be an intentional sacrifice of a part of the property for the purpose of saving the remainder from a common peril, or extraordinary expenditures must be incurred for the purpose of saving the property in peril. The authority to determine when a sacrifice shall be made and what property shall be sacrificed rests with the master or other person lawfully in command of the ship. His right to sacrifice the property of other persons than the ship-owner is derived from necessity, whereby in circumstances of great peril he becomes the agent of all persons whose property in the common adventure is in peril. If this property is injured or destroyed by strangers to the ship and cargo, who are not employed by the master or other person in command, it is not a general average loss. This is evident if the act of

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the strangers is a tort ; but we do not see that it makes any difference in principle if the act of the stranger is justifiable on the ground of a public or paramount right.

The distinction between a fire put out by the authority of the master or other person in command and one put out by public authority, without regard to the will of the master, we think is sound.

When a ship has been brought to a wharf, so far as it has become subject to municipal control, if that control is exercised, we think that it stands no differently from any other property within the municipality, over which the same control has been exercised ; and that the general maritime law does not govern the reciprocal rights and obligations of the parties to the maritime adventure, so far as the consequences of this control are concerned, but that they are to be determined by municipal law.

In *Nimick v. Holmes, ubi supra*, so far as it appears, the fire was extinguished by the officers and crew of the steamboat.

In *Gregory v. Orrall, ubi supra*, the fire was extinguished by salvors, probably under the direction of the master.

In *Nelson v. Belmont, ubi supra*, the fire engines of the city of Charleston were employed by the master, and the sum of \$5,198 was allowed in the adjustment to the fire-engine companies for their services. The services must have been regarded as in the nature of salvage services.

In *White Cross Wire Co. v. Savill, ubi supra*, the fire was extinguished by the master.

Judgment on the verdict.

 CHILD V. BOSTON AND FAIRHAVEN IRON WORKS.

(137 Mass. 516.)

Corporation — individual liability — " debt."

The liability of a corporation for infringement of letters-patent, is not before judgment a " debt " for which the officers are liable.*

BILL to enforce individual liability of corporate officers. The opinion states the case.

* See *Matter of Boston, etc., Iron Works*, 28 Fed. Rep. 890.

C. Browne, for defendants.

C. E. Washburn, for plaintiff.

FIELD, J. The plaintiff's case, as stated in this bill in equity, is that the defendant corporation, during the years 1869, 1870, 1871 and 1872, was engaged in manufacturing printing-presses, in violation of the rights secured to the plaintiff by letters-patent of the United States; that on December 17, 1872, he filed his bill of complaint against the corporation in the Circuit Court of the United States for the District of Massachusetts, wherein it was adjudged that the letters-patent were valid, and that the corporation had infringed the plaintiff's rights under the same by the manufacture of printing-presses; that on March 23, 1880, he obtained a final decree against the corporation for \$5,640.26 damages and \$1,778.88 costs, as the profits which had accrued to the corporation from the manufacture of the printing-presses; that execution issued therefor, and was returned unsatisfied, whereupon the plaintiff brought this bill, for himself and all other creditors of the corporation, against the corporation and five persons who were officers and directors of the corporation during the years 1869, 1870, 1871 and 1872. The bill also alleges, that on December 17, 1872, when the bill in equity in the Circuit Court was filed, the debts of the corporation contracted by these officers in its management exceeded by \$9,000 its capital stock, and that in 1871, 1872 and 1873, these officers, or some of them, knowingly signed and filed false certificates of the assets and liabilities of the corporation.

The defendants have demurred to the bill, and the question raised by the demurrer is whether the defendants are liable to the plaintiff under the Stat. of 1870, chap. 224, § 38, cl. 3, 4. See Stats. 1863, chap. 169; 1870, chap. 224, §§ 13, 33. This is to be decided by determining whether the profits to be accounted for by the defendants in suits in equity for an infringement of patents, under the U. S. Rev. Stats., § 4921, constitute a "debt" or "contract," within the meaning of the Stat. of 1870, chap. 224, § 38. See Pub. Stats., chap. 106, § 60, cl. 3, 5.

[Omitting statutory considerations.]

Whatever reason once existed for giving a liberal construction to the word "debt" in the earlier statutes, on the ground that a stockholder in every manufacturing corporation was liable to have his

property taken to satisfy any judgment in any civil suit against the corporation, has now ceased to exist, when the stockholders and officers are only liable under special provisions of statute.

The word "debts," and the words "debts and contracts," do not in their legal sense ordinarily include liabilities for torts not reduced to a judgment. There is nothing in the statutes indicating that for the causes stated, the officers were to be made responsible for all the liabilities of the corporation. *Gray v. Bennett*, 3 Met. 522; *Chase v. Ingalls*, 97 Mass. 524; *Lowell v. Street Commissioners*, 106 Mass. 540; *Zimmer v. Schleeauf*, 115 Mass. 52; *Heacock v. Sherman*, 14 Wend. 58, *Esmond v. Bullard*, 16 Hun, 65; *Archer v. Rose*, 3 Brewst. 264; *Cable v. McCune*, 26 Mo. 371; *Dryden v. Kellogg*, 2 Mo. App. 87; *Bohn v. Brown*, 33 Mich. 257, 263.

It was said by Chief Justice SHAW, in *Gray v. Coffin*, 9 Cush. 192, 199, that "to create any individual liability of members for the debt of a corporation, a body politic, created by law, and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in considerations of public policy, and depending solely upon provisions of positive law. It is therefore to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute."

In *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 455, a case arising under the Stat. of 1829, chap. 53, Chief Justice SHAW said: "For though a question was made whether such a claim for unliquidated damages is a debt, within the meaning of the statute, we do not think it admits of a reasonable doubt, that all such claims for damages were intended to be included in the term 'debts.'" The claim there was of unliquidated damages for the breach of a contract by the corporation. See also *Byers v. Franklin Coal Co.*, 106 Mass. 131; *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

In *Carver v. Braintree Manuf. Co.*, 2 Story, 432, one Edson was excluded as a witness on the ground that he was interested in the event of the suit. The action was case for the infringement of a patent. The defendant was created a corporation by the Stat. of 1823, chap. 45, and was made subject to the Stat. of 1808, chap. 65, and the several acts in addition thereto. Edson was a stockholder at the time of the alleged infringement, although it seems he had sold out his stock before the action was brought. Mr. Justice

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STORY said: "I follow out the doctrine of the case of *Mill Dam Foundry v. Hovey*, 21 Pick. 455, which as far as it goes, disclaims the interpretation of the word 'debt' as limited to contracts for the payment of determinate sums of money. Passing that line, it does not seem to me easy to say, that if cases of unliquidated damages may be treated as debts, because they end in the ascertainment of a fixed sum of money, we are at liberty to say, that the doctrine is not equally applicable to all cases of unliquidated damages, whether arising *ex contractu* or *ex delicto*. If ultimately it ends in a debt, as a judgment for damages done, that case asserts that its character as a debt relates back to its origin. Besides it seems to me upon principle to be reasonable, if not absolutely justified by authority, to hold, that if the transaction occurs while a person is a member of the corporation, and he would, if he remained a member, be liable for the ultimate debt adjudged, it may well be treated as an inchoate debt consummated by the judgment." 2 Story, 451.

This case was cited in *Wyman v. American Powder Co.*, 8 Cush. 168, 182, which was an action of assumpsit, and independently of the form of it, the cause of action was essentially *ex contractu*.

There are no cases decided by the courts of the Commonwealth in which a stockholder has been held liable for a tort of the corporation, and the decision of Mr. Justice STORY stands unsupported by any direct authority, either before or since.

The Stat. of 1870, chap. 224, § 38, provides that "the officers of corporations shall be jointly and severally liable for its debts and contracts in the following cases, and not otherwise." The second clause of section 38 provides that they shall be liable for all "debts contracted between the time of making or assenting to a loan to a stockholder and the time of its repayment, to the extent of such loan." The third clause provides, that "when the debts of a corporation shall exceed its capital," they shall be liable "to the extent of such excess existing," etc. The debts and contracts of a corporation may not be the debts and contracts of individuals, because the corporation is a legal person and can contract. If the corporation is worthless, the creditor may have no effectual remedy, and therefore in the cases specified the statute has given an additional remedy. In this respect, the statute was enacted apparently for the protection of persons who deal with the corporation. But the torts of a corporation are also the torts of natural persons, because the corporation can only act by means of persons, and these persons

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are liable as well as the corporation. There are indeed torts arising from contracts for which either case or assumpsit is the proper form of action, but the action in either form is essentially an action for the breach of a contract, express or implied. Liability for wrongs done which are independent of contracts cannot, we think, be considered a debt or contract within the meaning of the statute. Whether if a judgment is recovered in an action of tort, it then becomes a debt of record within the meaning of the statute, we have no occasion to consider because there is no allegation that any of the personal defendants were officers of the corporation, or did any of the acts alleged at or after the time when the final decree against the corporation was entered. See *Curtis v. Harlow*, 12 Metc. 3.

The plaintiff contends, that as the decree is only for the profits that accrued to the defendant corporation, his claim is not for damages arising from a tort, but for a debt due from the corporation, for money received to his use ; and *Watson v. Holliday*, 20 Ch. Div. 780, is cited. In that case Mr. Justice KAY said : " It is a case in which the claim undoubtedly arises from that which is properly called in legal language a tort ; and if I were to hold the claim to be for damages, or in the nature of damages, I must hold that the thirty-first section takes away that right of proof, which I cannot doubt existed in respect of this equitable claim, before that section was passed." He then considers an account of profits in a suit for the infringement of a patent, not as a remedy in the nature of damages, but as an equitable claim for money had and received, regarding the person who has committed the tort as having been in fact in the position of an agent or trustee for the plaintiffs, and he admits the claim to proof under the Stat. of 32 & 33 Vict., chap. 71, § 31. It is a well-known rule, that if property has been wrongfully converted and sold, the owner may waive the tort, and sue for the money ; but the foundation of the action is a tort for which trespass or case would lie, and the action proceeds, not on the ground of a contract, but of an equitable obligation to pay over the proceeds of the sale. *Jones v. Hoar*, 5 Pick. 285 ; *Bugelow v. Jones*, 10 Pick. 161.

Root v. Railway, 105 U. S. 189, reviews the United States cases on the nature of profits which are recoverable in a suit in equity brought to enjoin the infringement of a patent, and holds that they are awarded in equity only as an incident to some other equity, the right to enforce which secures to the patentee his standing in a court of equity.

That the infringement of a patent is essentially a wrong independent of contract, has not been denied. The Circuit Court of the United States, in taking jurisdiction in equity to restrain the further infringement of a patent, before the U. S. Stat. of July 8, 1870, was accustomed to decree to the plaintiff the profits actually received by the defendant; and as the court, as a court of equity, was not expressly authorized by a statute to award damages, it proceeded on the equitable theory of treating the wrong-doer as a trustee holding for the use of the patentee the profits actually received for the use or sale of the patented article; but these, if the plaintiff elected to claim them, were in the nature of compensation or damages for the wrong done, although perhaps not all the damages recoverable if the plaintiff also brought an action at law.

By the U. S. Stat. of July 8, 1870, § 55, the complainant in a bill in equity for the infringement of a patent is entitled to recover, "in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case," etc. See U. S. Rev. Stats., § 4921. Since this statute, the complainant, if he can maintain the bill, is entitled to recover damages in equity as fully as he can at law. If he recover only the profits, they are regarded as a full compensation for the injury sustained by the infringement. The case of *Roul v. Railway*, *ubi supra*, shows that the infringer is not in fact a trustee of the patentee for the profits.

We think that the decree which the plaintiff has obtained against the defendant corporation is, in legal effect, a judgment for all the damages done him by the infringement of his patent, which was a tort not arising from any contract, and that the liability therefor, before the decree was obtained, was not a "debt" or "contract," within the meaning of the Stat. of 1870, chap. § 38.

Bill dismissed.

SPRING V. INHABITANTS OF HYDE PARK.

(137 Mass. 554.)

Municipal corporation — board of health — right of eminent domain

In the absence of express statutory authority, the board of health of a town has no right to take possession of a dwelling-house and its furniture without the consent and to the exclusion of the owner and occupant, and use the house as a hospital for a person found therein infected with a contagious disease, and too sick to be removed without danger to his health; and the owner cannot maintain an action against the town for such use and occupation of the house.*

ACTION for use and occupation of a dwelling-house. The opinion states the case. The defendant had judgment below.

S. J. Thomas, for plaintiff.

J. E. Cotter, for defendant.

DEVENS, J. The overseers of the poor of the cities and towns of the Commonwealth have always been treated as public officers, performing the public duties with which they are charged upon their own responsibility. As they are engaged in performing the duty, which the statute had imposed upon the towns, of relieving poor persons falling into distress within their limits, they may therefore incur expenses or make contracts, within their lawful powers, for which the towns would be liable. *Belfast v. Leominster*, 1 Pick. 123; *Oakham v. Sutton*, 13 Metc. 192; *Ireland v. Newburyport*, 8 Allen, 73; *Smith v. Peabody*, 106 Mass. 262; *Aldrich v. Blackstone*, 128 Mass. 148. The statutes creating or authorizing the creation of boards of health have in a similar way provided for boards, which in the performance of the important duties imposed upon them, act as public officers, but on behalf of the towns by which they are chosen or appointed. Stat. 1837, chap. 244; Rev. Stat., chap. 21; Gen. Stat., chap. 26; Pub. Stat., chap. 80. While it is not provided, in terms by whom the expenses they are authorized to incur are to be paid, or the contracts they are authorized to

* See *Beckwith v. Sturtevant*, 42 Conn. 158; *Bamber v. City of Rochester*, 63 How. Pr 108.

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make are to be performed, it is necessarily implied, that when expenses are incurred or contracts are made within the lawful scope of their authority the town is liable therefor. These boards are official bodies, having no interest in the questions before them, no funds in their possession for the performance of the manifold duties with which they are charged, and unless they might charge the town on behalf of which they act, they would be, from the want of means, absolutely powerless. *Springfield v. Worcester*, 2 Cush. 52; *Salem v. Eastern Railroad*, 98 Mass. 431; *Winthrop v. Farrar*, 11 Allen, 398; *Watertown v. Mayo*, 109 Mass. 315; s. c., 12 Am. Rep. 694; *Taunton v. Taylor*, 116 Mass. 254; *Labrie v. Manchester*, 59 N. H. 120; s. c., 47 Am. Rep. 179. Careful provision has also been made for the ultimate liability for the expenditure which may be made by any town in the care of infected persons, and for the protection of the public. Gen. Stats., chap. 26, § 16; Pub. Stat., chap. 80, §§ 40, 83.

We do not therefore doubt, that for expenses lawfully incurred, or contracts lawfully made, by the board of health of the defendant town, in the performance of its duties, the town must be held responsible; but it must appear that what the board did was within scope of its lawful authority. While acting on behalf of the town, it is not an agent of the town in any sense which should make the town responsible for its acts when they exceed its lawful authority, as a principal may often be held liable under such circumstances for the agent whom he appoints. As a general rule, a town is not liable for the unauthorized or unlawful acts of the public officers whom it appoints, although done *colore officii*. *Thayer v. Boston*, 19 Pick. 511, 515; *Gordon v. Taunton*, 126 Mass. 349. It is not responsible for an assault and battery committed by one of its police officers, although done in the attempt to enforce an ordinance of the city. *Bultrick v. Lowell*, 1 Allen, 172.

It is therefore essential to determine whether the plaintiff's declaration sets forth any act done or contract made by the board of health, for which the town is responsible. The count is termed one in "contract," but it sets forth no elements of a contract or agreement, express or implied, so far as the board of health is concerned. It alleges that the plaintiff owned a certain house, described partly occupied by a tenant and partly by herself; that the small-pox broke out in the family of the tenant; that two persons were infected with it, one of whom could not have been removed without danger;

that the board, pursuant to its lawful powers, and acting for and on behalf of the town, took possession of the plaintiff's house and furniture therein as and for a hospital, and made it subject to the regulations of the board; that it occupied, controlled and used said house as a hospital for the term of six weeks and one day. The count does not allege that the board occupied the house by any leave of the plaintiff, or under any implied promise to pay for the same, but asserts a taking of her premises which would be a trespass unless it were done under authority of law. It concludes by a statement that the defendant owes a certain sum by reason of this taking and occupation, but does not here set forth any implied contract or promise to pay.

It must be deemed therefore that the plaintiff bases her action upon the ground that the board of health took possession of and occupied her premises by authority of law, and not by reason of any contract made between it and herself, as she sets forth none. The only allegation of a contract which can be extracted from this declaration is no more than this, that the board of health did a lawful act in seizing, without leave or authority of the plaintiff, her premises and the furniture, and in thereafter occupying and controlling it, and thus, as the act done was lawful, a promise to pay for the same will be implied against the town.

We are thus brought to the inquiry whether the board of health has authority, where a person infected with a contagious disease, and too sick to be removed without imminent danger, is found in any house, to take possession of the premises with the furniture therein, or so much thereof as it may deem necessary, and "occupy, control, and use" the same as a hospital, thus excluding the owner or occupant from his otherwise lawful possession thereof. The Gen. Stats., chap. 26, §§ 16, 17 (Pub. Stats., chap. 80, §§ 40, 41), provide that where a person is infected with a sickness dangerous to public health, "the board shall make effectual provision in the manner which it judges best for the safety of the inhabitants, by removing such person to a separate house or otherwise, and by providing nurses and other assistance and necessaries. * * * If the infected person cannot be removed without danger to his health, the board shall make provision for him as directed in the preceding section in the house in which he may be, and may cause the persons in the neighborhood to be removed, and take such other measures as it judges necessary for the safety of the inhabitants."

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These provisions contemplate that a contract will be made for the care of a person too sick to be removed, as by furnishing him with necessaries, nurses, etc., and further, that the place where he is, with its immediate vicinity and the persons there found, will be subjected to the regulations of the board of health. They give no authority to take possession of the property of any one, to the exclusion of him who is entitled to the lawful possession.

It is however rather upon the Gen. Stats., chap. 26, § 44 (Pub. Stats., chap. 80, § 75), that the plaintiff relies. This section, after providing that if a disease dangerous to the public health breaks out, the board shall immediately provide a hospital for the sick and infected, adds: "And the board may cause any sick and infected person to be removed thereto, unless the condition of such person will not admit of his removal without danger to his health, in which case the house or place where he remains shall be considered as a hospital, and all persons residing in or in any way concerned within the same shall be subject to the regulations of the board as before provided." The sections immediately preceding provide for the establishment of hospitals by the town, and for their being subjected to the regulations of the board of health, or a committee of the town appointed for the purpose. The latter clause of the section under discussion is intended to provide for the case which arises where a person cannot be removed, not by establishing the place where he is found as a hospital, and thus excluding therefrom those entitled to the possession thereof, but by treating it as such, to subject these and all other persons there residing or connected therewith to the regulations of the board. It is considered a hospital for this purpose, in order that thus the danger to the public health may be averted. It by no means follows that because a place may be subjected to the regulations of the board of health, it may be seized and taken possession of. Under the section relating to the quarantine of vessels, while the board of health may make regulations relating thereto, extending to all persons, goods, or effects thereon, or all persons visiting or going on board the same, they are not therefore authorized to take possession of, control, or appropriate the same, or any part thereof, to the use of a hospital. Gen. Stats., chap. 26, §§ 32-35; Pub. Stats., chap. 80, §§ 62-65. It was so held, under a statute similar to our own, in a case much discussed in Maine. *Mitchell v. Rockland*, 41 Me. 363; 45 Me. 496; 52 Me. 118.

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The case of *Lynde v. Rockland*, 66 Me. 309, 314, is strikingly similar to that at bar. The statute provided that where sick persons cannot be removed without imminent danger, "the house or place where the sick is shall be deemed a hospital for every purpose aforesaid, and all persons residing in or in any way concerned with it shall be subject to hospital regulations." Rev. Stats. of Maine of 1871, chap. 14, § 29. The allegations of the declaration set forth that the plaintiffs were owners of a hotel of great value, and that the board of health had taken possession of and appropriated the same for a hospital. It was held that no authority was conferred upon the board of health to seize or take possession of such property, and that the town was not therefore responsible for its act in so doing.

Had the power of seizing and appropriating property been conferred on the board of health acting by its own authority, it can hardly be doubted that it would have been given in explicit terms. It is of such a character that its exercise should be attended as far as possible with the care which marks judicial proceedings. It has been contemplated that in the exercise of its large powers in taking care of the sick and infected, and protecting the community, circumstances might arise where it would be necessary to take possession of property and impress persons also. For such a contingency the statutes have made ample provision. While the regulations and restrictions which the board of health may lawfully impose in regard to the management of property and the conduct of persons in relation thereto, in order that the public health may be protected and the spread of infection prevented, may often seriously affect its value, the right to impose such regulations as to the management has always been held to be quite distinct from that of appropriating private property, when an emergency requires it, to public use. The one rests upon the police power of a State, which extends to all matters concerning its internal regulation; the other upon its right of eminent domain. As the one prescribes the modes in which each shall enjoy his own property, in order that others may enjoy theirs, or that their health and welfare may be secured, the owner who is subjected to such regulation has of right no title to any compensation, even if the value of the property is thereby diminished. It is a necessary burden which he bears as a member of society in common with all others similarly situated. As by the other his property is appropriated to the public, he is

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entitled to proper compensation therefor. *Commonwealth v. Alger*, 7 Cush. 53, 85 ; *Commonwealth v. Bourse*, 132 Mass. 542, 546.

The proceedings which are necessary where property or persons are to be impressed may be initiated upon the application of the board of health. Warrants may be issued by two justices of the peace to executive officers, "requiring them under the direction of the board to remove any person infected with contagious sickness, or to impress and take up convenient houses, lodging, nurses, attendants and other necessities for the accommodation, safety and relief of the sick." One justice of the peace may issue a warrant to the executive officers authorizing them to secure infected articles, to impress aid in so doing, and under the direction of the board, to impress houses or stores for their safe keeping, and further authorizing the breaking open of shops and stores when necessary. Provision is further made for a just compensation to be paid to those interested by the town in which persons or property are impressed by the executive officers. Gen. Stats., chap. 26, §§ 19-24 ; Stat. 1877, chap. 211 ; Pub. Stats., chap. 80, §§ 43-48.

It is thus seen that while the impressment of property is provided for, it is accompanied by all appropriate safeguards. It is only by virtue of warrants regularly issued and served by executive officers, who while they are to act under the direction of the board, are still to obey the precepts contained in their warrants, that property is seized and taken possession of for an important public purpose, and just compensation is provided for.

Independently of these provisions there is no authority in the board of health to take possession of or impress any place as a hospital. If therefore the board of health took possession of the plaintiff's house and furniture and occupied, controlled and used said house as a hospital, it had no authority so to do, and the defendant town is not responsible for its action.

Demurrer sustained.

COMMONWEALTH v. POMPHRET.

(187 Mass. 564.)

Criminal law — selling intoxicating liquors — club.

A private club owning intoxicating liquors and employing one of its members as a steward, paying him for his services and for the use of a room where the liquors are kept, the steward delivering the liquor to other members on checks which he has previously sold them, and the money for which he uses in buying liquors in the name of the club, the steward may not be convicted of keeping intoxicating liquors with intent to sell them.

CONVICTION of unlawfully selling intoxicating liquors. The opinion states the case.

J. B. Carroll, for defendant.

E. J. Sherman, attorney-general, for Commonwealth.

FIELD, J. The instructions given, in their application to the facts in evidence, do not seem to us to differ materially from the instructions which were held erroneous in *Commonwealth v. Smith*, 102 Mass. 144, except that in that case the court below ruled that the facts supposed "would be a sale by the defendant;" and in this case the court ruled that from the facts supposed "the jury may find that said liquors were kept by" the defendant "for unlawful sale." This change in the ruling may have been made for the purpose of meeting the suggestion found in the opinion in *Commonwealth v. Smith*, that the arrangement described "may have been a mere evasion of the law," "which would be a question not of law but of fact, and would fall wholly within the province of the jury."

The legislature, within the limitations of the Constitution, can prohibit under a penalty any acts it sees fit. The meaning of the statutes must be determined by construction and criminal statutes are to be construed strictly, although the whole scope of the statutes must undoubtedly be considered.

The legislature, by the Pub. Stats., chap. 100, § 1, has prohibited the selling, or exposing or keeping for sale, spirituous or intoxicating liquor, except as authorized in that chapter. It has not undertaken to prohibit the drinking or buying of intoxicating

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liquor, or the distribution of it in severalty among persons who own it in common. If therefore two or more persons unite in buying intoxicating liquor and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial. If they intend in this manner to obtain intoxicating liquor to drink, without thereby subjecting any person to the penalties of the statute, they still act with impunity, because what they do is not prohibited by the statute. The evasion of the law intended in *Commonwealth v. Smith* is an evasion by means of a form or device which is apparently legal while the substance of what is done is within the prohibition of the statute.

In that opinion it is said : " If the liquors really belonged to the members of the club and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale. On the other hand, if the whole arrangement were a mere evasion, and the substance of the transaction were a lending of money to the defendant, that he might buy intoxicating liquors to be afterward sold and charged to his associates, or if he was authorized to sell or did sell, or keep any of the liquors with intent to sell, to any persons not members of the club, he might well be convicted." The " previously arranged system " referred to was similar to that in the case at bar in many respects.

The word " club " has no very definite meaning. Clubs are formed for all sorts of purposes, and there is no uniformity in their constitutions and rules. It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of many conveniences which the members enjoy. If a club were really formed solely or mainly for the purpose of furnishing intoxicating liquors to its members, and any person could become a member by purchasing tickets which would entitle the holder to receive such intoxicating liquors as he called for, upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to

buy, and the sale of what might be called a temporary membership in the club, with a sale of the liquors, would not substantially change the character of the transaction. One inquiry always is whether the organization is *bona fide* a club with limited membership, into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common, with the mutual rights and obligations which belong to such common ownership, under the constitution and rules of the club, or whether either the form of a club has been adopted for other purposes, with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create, or a mere name has been assumed without any real organization behind it.

The decisions of other courts which are pertinent undoubtedly turn more or less upon the particular language of the statute construed. *Gruff v. Evans*, 8Q. B. Div. 373, was decided on the ground that there was no transfer of the general or absolute property, but a transfer of a special interest, as all the members of the club were owners in common, and that as the club was *bona fide* a club, the furnishing of liquors to a member was not a sale, within the meaning of the English licensing act of 1852. *Seim v. State*, 55 Md. 566; s. c., 39 Am. Rep. 419, was decided upon the same general ground.

In *Rickart v. People*, 79 Ill. 85, the court say: "The whole thing is a subtle artifice, planned with a view to avoid the penalties denounced against persons violating the law." "The proposition is absurd that the ticket-holders really owned the liquors with which the bar was stocked." The court also say, that if the theory of the defense were adopted, "the liquors would belong to the company as partnership stock, and the company would have no more rightful authority to sell to the individual members, or partners, at retail, without a license to keep a dram-shop, than a mere stranger would have." "But the alleged association is a mere fiction." "The statute makes the giving away of intoxicating liquors, or other shift or device to evade its provisions, unlawful selling." "It was a question of fact whether the association was a mere shift, or device, to evade the provisions of the law, and the jury having found it was, we see no reason to be dissatisfied with the conclusion reached."

In *Marmont v. State*, 48 Ind. 21, it was distinctly decided that the delivery by the club or society, through its agent, of beer which was the common property of the society to a member of the society,

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upon credit or for cash, and which thereby became the separate property of the member, was a sale within the meaning of the Indiana statute of 1873. *State v. Mercer*, 32 Iowa, 405, resembles *Marmont v. State*. To the same effect is *Martin v. State*, 59 Ala. 34.

The decision of the case at bar is not to be governed wholly by any general definition of the word "sale," or "selling." After the decision in *Commonwealth v. Smith*, the Stat. of 1875, chap. 99, was passed, which is the foundation of those provisions in the Pub. Stats. chap. 100, under which this complaint was made. Nothing is contained in that act or in any subsequent acts, which in terms relates to clubs, until the Stat. of 1881, chap. 226, was passed. The provisions of the public statutes prohibiting the selling or exposing or keeping for sale of spirituous or intoxicating liquor, except those derived from the Stat. of 1881, chap. 226, are similar to those contained in the Stat. of 1868, chap. 141, which were construed in *Commonwealth v. Smith*. The Stat. of 1881, chap. 226, is perhaps broader in its terms than was necessary to accomplish its apparent purpose; because no doubt has been expressed that a selling of intoxicating liquors by a club to persons who are not members is an illegal sale under other statutes, unless the club is duly licensed to make the sale. The intention of this statute however plainly is to distinguish between clubs in those cities and towns whose inhabitants vote to grant licenses and clubs in those whose inhabitants vote not to grant licenses, and unlicensed clubs in the former cities and towns are left to be dealt with under other statutes. It must be assumed that the decision in *Commonwealth v. Smith* was known to the legislature at the time the existing statutes were passed. The inference is that the legislature intended that unlicensed clubs in cities and towns whose inhabitants vote to grant licenses must be dealt with according to the construction given by this court to statutory provisions similar to those in existing statutes prohibiting the sale, or exposing or keeping for sale, of intoxicating liquors.

The ruling and instruction in this case seem to us to assume that this was *bona fide* a club; that the liquors were owned in common by the members; that they were furnished only to members; and that they were kept by the defendant as one of the members and as steward of the association. It does not appear in the exceptions in what manner new members were admitted, except that they paid

an admission fee of one dollar, but we cannot assume that any person could join the association at his pleasure ; and the ruling and instruction are not put upon the ground that there was evidence that this was an association open to anybody at a price. On the assumptions upon which we understand the instructions to proceed we think that under the decision in *Commonwealth v. Smith*, it was not competent for the jury to find the defendant guilty.

New trial granted.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

TOBIN v. DEAL.

(80 Wis. 87.)

Conversion — intent — driving away cattle

If one drives the cattle of another upon a highway in a direction known to him to be opposite to the owner's residence, and they are lost in consequence, he is liable for conversion, although he did not intend it.

It seems, that if one finds stray cattle on his land doing damage, in the afternoon, he may confine them over night, and turn them into the highway in the morning. By COLE, C. J.

CONVERSION. The opinion states the facts. The defendant had judgment below.

Humphrey & McDonald and *Tenney & Bashford*, for appellant.

L. P. Wetherby, for respondent.

COLE, C. J. It seems to me there was error in the charge in respect to the responsibility of the defendant if he drove the calves away and they were lost. On that point the learned Circuit Court in effect charged that if the defendant was driving some pigs down the highway and the calves being in the highway ran along ahead

of the pigs, and the defendant did not intentionally or purposely drive the calves away but acted in good faith with ordinary care in the matter, he would not be liable; but if he intentionally drove the calves away and they wandered off and were lost then he would be. This was making the responsibility of the defendant depend wholly upon the question whether he acted in good faith and with care, whereas, as said by plaintiff's counsel, the motive which prompted the act had nothing to do in determining his liability for the loss. The intent is not necessarily an element in trespass; it is sufficient if the act be committed without any justification or legal excuse. Any unlawful interference with, or acts of ownership over the property would render the defendant liable if as a consequence the calves were lost. *Dexler v. Cole*, 6 Wis. 319; *Hazleton v. Week*, 49 Wis. 661; s. c., 35 Am. Rep. 796. Evidence as to the *quo animo* with which the trespass was committed is admissible to enhance the damages. But if the defendant drove the calves along the highway beyond his own premises it was an unlawful act, and he is responsible for the consequences which resulted therefrom. *Young v. Vaughan*, 1 Houst. (Del.) 331; *Knott v. Digges*, 6 Har. & J. 230; *Knour v. Wagoner*, 16 Ind. 414; 1 Thomp. Neg. 217, § 29; *Gilson v. Fisk*, 8 N. H. 404. The animals might have been wrongfully in the highway, but that would not excuse the defendant in driving them away. He knew the calves belonged to the plaintiff and that he was driving them away from, or in a direction opposite to the plaintiff's premises. This was tortious and rendered the defendant liable in this action for a conversion of the calves, if they wandered away and were lost, whether he intended that result or not.

There is some difference of opinion among the members of this court as to the correctness of the following charge, which was excepted to by the plaintiff. The court said: "The question of the liability of the defendant here depends altogether upon whether he drove that property off after he had turned it off from his place. It seems that he took up the property the day before it is claimed he drove them off, somewhere about three or four o'clock. He claims that he did that to prevent them committing further depredation upon his crops, and [I am inclined to hold as a matter of law, and so charge you, that if he did so for the purpose of keeping the calves from committing depredation during the night, and if he had reasonable grounds for supposing that it was necessary to do so in order to protect his crops, he was justified in doing it.] If

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there was no necessity of it in order to protect his crops he would not be justified in doing it, [and if there was such a necessity I think he had the right to do it, and he had a right to keep them and in the morning turn them into the highway, and if they were rightly taken possession of and he in the morning simply turned them into the highway without driving them off he is not liable in this action].” These parts of the charge included in brackets were duly excepted to.

There was testimony given which tended to prove that the defendant found the calves doing damage on his lands, destroying his corn and cabbage, and that he took them up in the afternoon, shut them in his yard and kept them until the next morning, when he opened the gate and turned them into the highway. The calves came upon his lands from the highway and there was no fence around the corn and cabbage. The defendant testifies that he shut the calves up in his yard to prevent them from eating his cabbage. He says: “I shut them out so that they would not eat up my cabbage any more. I turned them out because I did not want to bother to hold them any longer. I did nothing to the calves any more after I turned them out. I see they went into Packenham’s field. Then they went across and took the other road south.”

This is the testimony to which the charge refers, and the question is: Was the court correct in holding, as a matter of law, that the defendant was justified, upon finding the calves doing damage on his premises, in confining them for the night in the yard to prevent them from destroying his crops, and then in the morning turning them into the highway whence they had come upon his land? It seems to me he had the right to exercise that control over the calves temporarily to protect his property. A person finding cattle wrongfully upon his land may turn them into the highway, and if they stray away he is not responsible. *Cory v. Little*, 6 N. H. 213; *Gilson v. Fisk*, *supra*. He has the right to drive them off by any of the ordinary means to which a prudent man would naturally resort, and may use a dog for that purpose, unless there is something in the size or habits of the dog, or in the mode of setting him on, on pursuing, which would negative the idea of ordinary care and prudence. *Wood v. La Rue*, 9 Mich. 155; *Clark v. Adams*, 18 Vt. 425; *Davis v. Campbell*, 23 Vt. 236; *Totten v. Cole*, 33 Mo. 138. But when cattle escape through a defect in defendant’s fence, or in consequence of defendant’s taking down a sufficient division fence which the

plaintiff is bound to maintain, the defendant then cannot drive them into the highway, but must return them to the close whence they escaped, or he will be deemed a trespasser. *Carruthers v. Hollis*, 8 Ad. & El. 113; *Roby v. Reed*, 39 N. H. 461; 2 Waterman Trespas, § 889. Did the defendant become a trespasser because he shut the calves up in his yard for the night in order to protect his crops? For myself, I am unable to perceive any legal principle by which he should be so considered. He only exercised such control over the property for the time being as was necessary to protect himself. What should he have done under the circumstances? Did the law impose upon him the duty of driving the calves into the highway and taking his chances of their returning to his premises? Was he bound to sit up and watch them and see that they did not return? We can readily conceive of a case where cattle would do more damage in a night to one's crops, garden, or shrubbery, than they were worth, and where the owner was irresponsible. In view of these very obvious considerations, it seems to me when the defendant shut up the calves for the night in his yard in order to prevent their doing damage to his crops, and turned them into the highway in the morning whence they had come upon his land, he only exercised a license or control over them which the law allowed. It may be conceded that he had the right to distrain the calves which were doing damage on his premises, and for that purpose might confine them as he did. But was he bound to pursue that remedy to justify his acts? He might not wish to distrain the calves. Indeed, it is certain from his own statements that he had no idea of doing so. He said he turned them out because he did not wish to "bother" with them or hold them longer. We suppose it was optional with him to distrain the calves or not. *Stevens v. Curtis*, 18 Pick. 227. If he elected to distrain he was then doubtless bound to follow strictly the course pointed out by the statute, or he might become liable as a trespasser. If the distrainer fails to take the steps prescribed by the statute he forfeits his right to detain the property for his damages. The owner may take it, or if the distrainer refuses to deliver it on demand, he may sue in trover for it. *Nelson v. Merriam*, 4 Pick. 249; *Hale v. Clark*, 19 Wend. 498. A mere nonfeasance will not make a party a trespasser *ab initio*. *Hale v. Clark*. A party may abandon his distress and pursue his common-law remedy. *Colden v. Eldred*, 15 Johns. 220. Where a distress is made, the statute gives the distrainer the right to the possession of the animal

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for twenty-four hours, within which time he must give the owner notice, etc., and the owner has no right within that time to take the animal from his inclosure. *Pettit v. May*, 34 Wis. 666 ; *Allaback v. Ull*, 51 N. Y. 651.

But this discussion of the law of distress does not greatly aid in determining the question of the correctness of the charge. It may have this relevancy, if the distrainer may relinquish the proceedings by distress before he has recovered satisfaction for his damages, and bring an action of trespass, as the authorities hold, it would seem to follow that the first taking was not tortious. But the defendant did not claim that he shut up the calves for the night because he was intending to distress them, and afterwards abandoned his purpose and turned them out, nor did the court put his justification upon any such ground. The view of the court was that he had the right to shut up the calves for the night, if necessary, for the protection of his crops; that such an interference with the owner's possession would be lawful. He had the unquestioned right when he found the calves trespassing upon his premises to drive them directly into the highway, and if they wandered away and were lost it would not be his fault. He did not see fit to do that, but secured them for the night for a proper purpose, and turned them into the highway in the morning. Of course, he might have kept the calves in his yard, caring for them properly, notified the plaintiff where they were, and given the latter an opportunity to take them away. There would surely be nothing in all that inconsistent with the plaintiff's rights as owner. It would be a kind, neighborly act. But was the defendant bound to take that course? did he owe that duty to the plaintiff under the circumstance? It seems to me he did not. The golden rule, "Whatever ye would that men should do to you, do ye even so to them," might require this, but legal duties and obligations fall short of this high ethical standard. So it seems to me there was nothing illegal in the defendant's shutting up the calves to prevent them destroying his crops, or in his subsequent conduct in turning them into the highway. But as there was evidence that a few hours later he came upon the calves in the highway and drove them still further from the plaintiff's premises, upon a cross road, the charge first noticed was erroneous.

BY THE COURT. The judgment of the Circuit Court is reversed, and a new trial ordered.

Ordered accordingly.

WRIGHT V. CITY OF FORT HOWARD.

(80 Wis. 119)

Evidence — one's own physical suffering.

In an action for personal injuries, the plaintiff may testify to his pain and internal condition, perceptible to his senses.

ACTION for a fall on a defective sidewalk, resulting in a miscarriage. The plaintiff had judgment below.

Charles E. Vroman, for appellant.

Hudd & Wigman, for respondent.

CASSODAY, J. [Omitting other points.] The same witness was also asked this question: "What injury are you suffering from now in consequence of that fall?" This was objected to as immaterial and incompetent, and for the further reason that the witness had not shown that she had medical knowledge, or was capable of testifying as an expert. The question was certainly material and competent for the reasons given. Was it objectionable for want of medical knowledge or capacity of the witness to testify as an expert? The mere opinion, without knowledge, of a non-expert is inadmissible. *Yanke v. State*, 51 Wis. 469. But here the inquiry was as to what injury the witness herself was then suffering from in consequence of the fall? It did not necessarily call for the exercise of any scientific knowledge or skill. It called for facts relating to the then present condition of the witness, her suffering and the source of it. The nature of the injury was such that the cause of her suffering was more or less latent and concealed from common observation, and yet necessarily perceptible to the senses of the witness. It in effect asked her what pain or disability she was then enduring in consequence of the fall. It is very much like the question put to the plaintiff witness who sued for personal injury in *Creed v. Hartman*, 8 Bosw. 123, which was this: "State to the jury the effect of that injury upon you, and how your situation is." And it was held admissible on the ground that there was no opinion of an expert elicited or requested. It simply called for "facts of which,"

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the court said, "she, in some respects, could alone be fully apprised, and in all was best apprised." That case was affirmed in the Court of Appeals; but seemingly, counsel abandoned that objection, for it received no attention in that court. 29 N. Y. 591. To the same effect is *South & N. A. R. Co. v. McLendon*, 63 Ala. 266; *Lawson Exp. Ev.* 470, *et seq.* Mrs. Wright was certainly much better qualified to state her own internal condition, her own pain and suffering, and perhaps the source and cause of it, than any one else, and especially better than any non-expert. But courts have gone further, and held that unskilled witnesses are not precluded from testifying to such facts as come within their own observation, relating to ordinary injuries or sickness of those with whom they have consorted. *Sydelean v. Beckwith*, 43 Conn. 9; *Parker v. B. & H. Steamboat Co.*, 109 Mass. 449; *Comm. v. Sturtivant*, 117 Mass. 122; s. c., 19 Am. Rep. 401; *Thompson v. Stevens*, 71 Penn. St. 161; *Elliott v. Van Buren*, 33 Mich. 49; s. c., 20 Am. Rep. 668; *Wilkinson v. Moseley*, 30 Ala. 562; *Rogers v. Crain*, 30 Tex. 284; 1 Greenl. Ev., § 440, and notes. The rule seems to be based on the ground of necessity, and confined to cases where the subject of inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts are so numerous or changeable as to be incapable of being held in the memory or detailed to the jury. *Ibid.* We must therefore conclude that where a plaintiff sues for personal injury and is a witness in his own behalf, and his pain, suffering, or internal condition is pertinent to the issue and perceptible to his senses, a question put to such party eliciting a description of such pain, suffering, or condition, and not necessarily requiring scientific skill or knowledge, is a question calling for facts, and not mere opinion.

BY THE COURT. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Atkinson v. Goodrich Transportation Company.

ATKINSON V. GOODRICH TRANSPORTATION COMPANY.

(60 Wis. 141.)

Municipal corporation — ordinance — fire — negligence.

A municipal ordinance, forbidding the running of any steamboat, without a spark-arrester to prevent the escape of sparks "as effectually as the same can be prevented by any means known or in use," is unreasonable.*

In an action for negligent communication of fire, the concurrent negligence of another is no defense.

ACTION for negligent fire communicated by a steamboat. The opinion states the points. The plaintiff had judgment below.

Ellis, Greene & Merrill, for appellant.

Vroman & Sale, and *Cameron, Losey & Burns*, for respondent.

TAYLOR, J. [Omitting other points.] The objections to the evidence relate to the ordinance of the city of Green Bay, which was offered by the plaintiff as evidence. There are several objections raised by the learned counsel for the appellant to the validity of this ordinance. First, it is said to be regulation of commerce, and therefore void. Second, that it was a violation of the regulations of the inspectors of boats and vessels, and its use would endanger the boat, its cargo and passengers; and third, that it was an unreasonable ordinance. We do not feel called upon to determine whether the first and second objections to the ordinance were well taken, as we have come to the conclusion that the ordinance should either have been rejected as an unreasonable ordinance, or its reasonableness should have been submitted to the jury. We are inclined to hold the ordinance unreasonable as a question of law, because it requires the boat-owner to use a spark-catcher, screen, or other device "substantially attached in or upon the smoke-stack or chimney, * * * so as to prevent the escape of sparks or burning cinders therefrom as effectually as the same can be prevented by any means known or in use for that purpose." Under this ordinance every steamboat-owner, no matter how care-

* See note, 35 Am. Rep. 702.

ful he had been to use the means of preventing the sparks from escaping from the smoke-stack of his boat while navigating the harbor, would still be liable for a violation of the ordinance if a jury could be satisfied that his device was not the best known or in use; and if the ordinance is to be strictly enforced he would be equally liable although the device used was as effective for the purpose as any other, if it were not substantially attached in or to the smoke-stack. Amidst the hundreds of devices known or used it would be very difficult indeed for the steamboat-owner to satisfy the requirements of the ordinance, and more difficult to satisfy a jury that he had in fact adopted the best known one in use. A law which inflicts a penalty or punishment ought to be so plainly drawn as to clearly point out the act to be punished. This ordinance fails to do that, and is therefore, we think, unreasonable. *Clason v. Milwaukee*, 30 Wis. 316; *Hayes v. Appleton*, 24 Wis. 542; *Burling v. West*, 29 Wis. 307; s. c., 9 Am. Rep. 576. If the evidence tended to show that a spark-catcher or other device fixed in or upon the smoke-stack of the boat endangered its cargo or passengers, then it would be a question for the jury whether such an ordinance was a reasonable one.

We think the court erred in permitting the ordinance to be read to the jury, and in instructing the jury that it was negligence *per se* on the part of the defendant to run its boat into the harbor of Green Bay without first having provided it with a spark-catcher as required by the ordinance.

Another point was pressed with a great deal of earnestness upon the court by the learned counsel for the appellant, as conclusive against the right of the plaintiffs to recover. The jury found that the owner of the planing-mill was negligent in permitting shavings and sawdust to remain and accumulate between the mill and the dock, under the circumstances developed by the evidence, and it also appears quite conclusive that the fire which was kindled by the sparks emitted from the smoke-stack of the defendant's boat (if any such fire was kindled) was kindled in these shavings and sawdust and spread to the mill and fired that. It is claimed by the learned counsel that this negligence of the mill-owner was such an intervening cause between the negligence of the defendant and the final destruction of the plaintiff's house that its destruction must be, in the law, attributed to such intervening cause, viz., the negligence of the mill-owner. The learned counsel for the appellant

cites Wharton on Negligence as sustaining his proposition. Although this learned author has gone as far, if not farther, than any other in sustaining the views of the learned counsel, we think he does not sustain him upon the facts of the case at bar. In Wharton on Negligence, section 144, the author lays down this proposition: "The fact that another person contributed, either before the defendant's interposition or concurrently with such interposition, in producing the damage, is no defense." He gives the following as an illustration of the rule: "A. negligently leaves certain articles in a particular place. B. negligently meddles with them. Supposing B's negligence to be made out, and he a responsible person, under the limitations above expressed he cannot set up A.'s prior negligence as a defense." This rule applied to the case at bar, shows that the steamboat company is liable for the results of the fire kindled in the shavings negligently suffered to remain on the dock by the owner of the planing-mill, when it is once clearly established that they were fired by the negligence of the defendant. When the defendant sets them on fire by reason of its negligence, B. negligently meddles with them, within the rule stated by the learned author.

Whether we consider the negligence of the owner of the planing-mill as an interposition before, or concurrently with the negligence of the defendant in producing the damage, it is no defense to the plaintiffs' action. This we think is fully established by nearly all the authorities, and as we understand the rule as stated by Wharton is not denied by him. In one sense the negligence of the owner of the planing-mill was concurrent with the negligence of the defendant. The negligence of the owner of the mill was a continuing negligence; it was present and acting at the time of the negligence of the defendant; it aided in kindling the fire and spreading it to the mill, and from that to the surrounding buildings. The authorities cited by the learned counsel for the respondents fully establish the fallacy of this objection made by the appellant. *Cooley Torts*, 79; *Ricker v. Freeman*, 50 N. H. 420; s. c., 9 Am. Rep. 267; *Lake v. Milliken*, 62 Me. 240; s. c., 16 Am. Rep. 456; *Bartlett v. B. G. L. Co.*, 117 Mass. 536; s. c., 19 Am. Rep. 421; *Johnson v. C. M. & St. P. Ry. Co.*, 31 Minn. 57; *Small v. U. R. I. & P. R. Co.*, 55 Iowa, 582; *Burroughs v. M. G. & C. Co.*, L. R., 5 Exch. 67; *Oil City Gas Co. v. Robinson*, 99 Penn. St. 1; *Rylands v. Fletcher*, L. R., 3 Eng. & Ir. App. 337; *Child v.*

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Hearn, L. R., 9 Exch. 183; 4 Eng. R. 487; *Illidge v. Goodwin*, 5 Car. & P. 190; *Davis v. Garrett*, 6 Bing. 716; *Greenland v. Chaplin*, 5 Exch. 247; *Lynch v. Nurdin*, 1 Q. B. 29; *Griggs v. Fleckenstein*, 14 Minn. 81; *Pastene v. Adams*, 49 Cal. 87; *Lane v. Atlantic Works*, 107 Mass. 104; *Powell v. Deveneg*, 3 Cush. 300; *Weick v. Lander*, 75 Ill. 93; *Del. L. & W. R. Co. v. Salmon*, 39 N. J. L. 309; s. c., 23 Am. Rep. 214; *The George and Richard*, L. R., 3 Adm. & Ecc. 474; *Collins v. Middle Level Commrs.* L. R., 4 C. P. 279; *Romney Marsh v. Trinity House*, L. R., 5 Exch. 204; *Binford v. Johnston*, 82 Ind. 426; s. c., 42 Am. Rep. 508; *Sneesby v. L. & Y. Ry. Co.*, L. R., 9 Q. B. 266; 8 Eng. R. 337; *Crandall v. Goodrich Transp. Co.*, 16 Fed. Rep. 82; *Stetler v. C. & N. W. Ry. Co.*, 46 Wis. 497; s. c., 49 Wis. 609, 622.

On account of the errors above indicated the judgment of the Circuit Court must be reversed.

BY THE COURT. The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Reversed and remanded.

WILL OF LADD.

(60 Wis. 187.)

Will—cancellation.

A will was wholly written on the first page of a double sheet. On the fourth page the testator wrote in pencil, "I revoke this will," and signed and dated it. This was not attested. *Held*, not a revocation, within a statute prescribing burning, tearing, cancelling, obliterating, or making a new will or codicil, or some other writing signed, attested and subscribed like a will, as the only modes of revocation.*

THE opinion states the case. The will was held to be revoked below.

Wm. E. Carter and A. R. Bushnell, for appellant.

J. T. Mills and John G. Clark, for respondent.

*See *Eschback v. Collins* (61 Md. 478), 48 Am. Rep. 123; *Succession of Mah* (85 La. Ann. 394), 48 Am. Rep. 242.

CASSODAY, J. The frauds incident to allowing written wills to be set aside by parol testimony finally culminated more than two hundred years ago in the trial of the feigned issue in *Cole v. Mordaunt*, where it appeared at the bar of the King's Bench that most of the nine witnesses against the will were guilty of deliberate perjury, and that the widow who sought to set aside the will was guilty of subornation of perjury. On a petition for a review of the case, Lord Chancellor NOTTINGHAM remarked that "he hoped to see one day a law that no written will should ever be revoked but by writing." See notes to *Mathews v. Warner*, 4 Ves. Jr. 196; *Prince v. Hazelton*, 20 Johns. 513. This remark and that trial led to the enactment of the statute of 29 Chas. II, "for the prevention of frauds and perjuries," in the following year. 3 Stat. at Large, p. 385. chap. 3. In fact, the eminent father of equity himself introduced the bill, as he afterward stated in *Ash v. Abdy*, 3 Swanst., 664; 4 Lives Ld. Ch. 271.

Section 6 of that chapter prescribed the manner in which a "devise in writing of lands, tenements, or hereditaments," or "any clause thereof," might be revoked, and prohibited revocation in any other manner. Our statute relates to personal property as well as real estate, and has some words transposed, and is slightly different in some other respects; but otherwise section 2290, R. S., is substantially the same as that section 6. The statute is imperative upon the court, and is to the effect that "no will, nor any part thereof, shall be revoked unless by (1) burning, (2) tearing, (3) cancelling, or (4) obliterating the same, with the intention of revoking it, by the testator, * * * or by some other (5) will or (6) codicil in writing, executed as prescribed in this chapter, or (7) by some other writing, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will." § 2290, R. S.

Here are seven ways prescribed, for revoking a will, and all other ways, except such as are implied by law, are expressly prohibited. Each of the first four is by doing a specified act to the will itself, with the intention of revoking it. Each of the last three must not only be in writing and signed, but also attested and subscribed in the presence of the testator by two or more competent witnesses. § 2282, R. S. It stands confessed that the writing in pencil was never attested or subscribed by any witness, much less by two witnesses in the presence of the testatrix. This failure to execute in the manner prescribed by the statute manifestly prevented the

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words written in pencil from going into effect as a written revocation.

It should be observed that the written and printed matter constituting the will was wholly on the first page of the double sheet. The second and third pages were entirely blank. The pencil writing was upon the fourth page, the outside of the wrapper leaf. Nevertheless, it is urged, in effect, that it was upon the same sheet of paper upon which the will was written, though remote from the writing, and hence that it should be held to have been done to the will itself, and that since the act so done consisted in writing words disclosing an intent to revoke, it must be held to be a "cancellation" of the will, "with the intention of revoking it," within the meaning of those words as used in the statute. This however assumes that the second half-sheet of the paper, upon which no part of the will appears, constitutes a part of the will. It this is so, than a sheet of paper may be never so large, and yet if a will be written upon one corner, and words indicating an intention to revoke be written upon another corner, however distant from every part of the first writing, yet it would have the effect to cancel the will. Would this be a fair construction of the statute? Would such a construction prevent "frauds and perjuries," according to the original intention of those who enacted the statute? Or would it be more in harmony with that intention to hold that the written and printed matter together, found on the first page of the double sheet of paper in question, constitutes the will of Mrs. Land? Of course there could be no written or printed matter except upon some substance, and hence so much of the first half-sheet of paper as was essential to the existence and preservation of such written and printed matter, may in a sense be regarded as a part of the will. But no part of the double sheet of paper, much less any portion of the first half-sheet upon which the will was written and printed, was in the least burned or torn. Nothing was done to any portion of the written or printed matter constituting the will. No part of it was obliterated. No part of it was erased or cancelled. No interlineation was made. All that constituted the will remained intact. Every part of it remained as perfect as when it was first written. The same would have been true if the second half-sheet had been entirely severed from the first. The only question is, whether it was canceled, within the intent of the statute, by the mere force of the meaning of the word "revoke" contained in the

pencil writing. As observed the statute requires, not only the act of cancelling the will itself, but that it must be done with the intention of revoking it. *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Doe v. Harris*, 6 Ad. & El. 209; *Francis v. Grover*, 5 Hare, 39; *Price v. Powell*, 3 Hurl. & N. 341; *Giles v. Warren*, 3 Eng. (Moak), 478; *White v. Casten*, 1 Jones Law, 197; *Means v. Moore*, Harper (S. C.), 314; *Cheese v. Lovejoy*, L. R., 2 Prob. Div. 251; 21 Eng. (Moak), 633; *Swinton v. Bailey*, L. R., 4 App. Cas. 70; 33 Eng. (Moak), 48; *Evan's Appeal*, 58 Penn. St. 238.

In *White v. Casten*, *supra*, the paper upon which the will was written was burned through in the three places, one of them being in the midst of the writing, and a large part was scorched, but the writing was not interfered with, when it was rescued against the testator's wish, and preserved against his knowledge, and it was held to be a revocation. The mere act of burning, tearing, cancelling, or obliterating the will itself, without the intent, is not enough. *Burtenshaw v. Gilbert*, 1 Cowp. 52; *Francis v. Grover*, 5 Hare, 39; *Locke v. James*, 13 Law J. Exch. 186; *Elms v. Elms*, 4 Jur. (N. S.) 765; *Bigge v. Bigge*, 9 Jur. 192; *Clarke v. Scripps*, 16 Jur. 783; *Giles v. Warren*, 3 Eng. (Moak), 478. So the mere intention to revoke the will, unaccompanied by any act of burning, tearing, cancelling, or obliterating, done to the will itself, is not enough. *Doe v. Harris*, 6 Ad. & El. 209; *Hise v. Fincher*, 10 Ired. Law, 139; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Gains v. Gains*, 2 A. K. Marsh. 190; *Runkle v. Gales*, 11 Ind. 95; *Perjus v. Perjus*, 4 Iowa, 520; *Heirs of Blanchard v. Heirs of Blanchard*, 32 Vt. 62; *Clungan v. Mitchellree*, 31 Penn. St. 25.

Some courts have held that where the testator is deceived into the belief that he had done an act sufficient to revoke the will, it shall have that effect. *Pryor v. Coggin*, 17 Ga. 444; *Smiley v. Gambill*, 2 Head, 164. The case in Head was put on the ground that there was no such statute in Tennessee, and the case in Georgia fails to refer to any statute or decision. On the other hand, several of the above cases hold that where the legatee has falsely deceived the testator into the belief that he has in fact revoked his will, he shall be held in equity to hold the property as trustee for the heir; but that there can be no revocation except in one of the modes prescribed by statute. But see *In re Wilson's Will*, 8 Wis. 171; *Allen v. McPherson*, 5 Beav. 469; 1 Phil. Ch. 133; 1 H. L. Cas. 191; *Gaines v. Chew*, 2 How. 619, 645; *Malin v. Malin*, 1 Wend. 625.

Will of Ladd.

The question however is not here involved, and is referred to merely because counsel seem to rely in part upon the Tennessee and Georgia cases.

Even if such intention to revoke be expressed in writing never so strongly and signed by the testator, yet if the writing was never in fact attested and subscribed by the requisite number of witnesses, in the presence of the testator, so as to become effectual as a revocation under the statute, it cannot operate as a revocation, when unaccompanied by any of the four acts, done to the will itself, specified in the statute. *Kirke v. Kirke*, 4 Russ. Ch. 441, 451; *Locke v. James*, 13 Law J. Exch. 186; 11 Mees. & W. 901; *Jackson v. Holloway*, 7 Johns. 394; *Hairston v. Hairston*, 30 Miss. 303; *Lewis v. Lewis*, 2 Watts & S. 455; *In re Penniman's Will*, 20 Minn. 245; *Laughton v. Atkins*, 1 Pick. 535; *Cheese v. Lovejoy*, 2 Prob. Div. 251; 21 Eng. (Moak) 633.

In *Kirke v. Kirke*, *supra*, the codicil was signed by the testator, who, among other things, in effect therein declared: "I do hereby revoke that part of my said will" which has been erased, and in lieu thereof substitute what has been interlined; but it was held by an eminent judge in such matters that although there was a clear intent to alter the will as indicated, yet that as the codicil had not been duly executed and attested so as to pass real estate, such intention was ineffectual and the original will was held to be in force the same as though there had never been any alteration.

In *Locke v. James*, *supra*, the testator erased the word "six" wherever it occurred in his will, but leaving it still legible, and inserted over it the word "two," and thereupon added, presumably upon the same paper, the following memorandum or codicil to his will, signed by him in the presence of one witness only: "The alterations in the first and second sheet, all relating to the said annuities left to my daughter E. J. and her children, were made by me the 15th of August, 1830. Witness my hand. R. N.;" and PARKER, B., speaking for the court, said that the "rent charge of £600 per annum, created by the will, duly executed and attested

* * * has not been cancelled, for the erasure was made *sine animo cancellandi*," and that it "has not been affected by the codicil, for the codicil is not duly attested and therefore cannot even be looked at, so far as the real estate is concerned."

In *Jackson v. Holloway*, *supra*, the testator, after having erased certain words and interlined others in place of them, and "at the

same time, indorsed on the will an instrument" to the effect that he had made the alterations named and thereby renewed the will, which instrument was duly signed, sealed and published by the testator in the presence of two persons, who also signed the same as witnesses in his presence. But because there were not three instead of two witnesses, as required by the statute of New York, it was held that the erasures, interlineations and the written indorsement so executed and witnessed had no effect whatever upon the original will.

In *Lewis v. Lewis*, *supra*, the word "obsolete" was written by the testator upon the margin of his will, but it was held to be of no significance.

In *Loughton v. Atkins*, *supra*, it was strongly intimated, if not held, that the written instrument containing words of revocation must itself be admitted to probate to have that effect.

In *Cheese v. Lovejoy*, *supra*, the testator had drawn his pen through the lines of various parts of his will, and then wrote on the back of it, "All these are revoked," and threw it among waste papers; but it was preserved, and it was held that there was no revocation, because the words "or otherwise destroying," in the present English statute were not satisfied. But that statute does not contain the words "cancelling or obliterating," like ours, and ours does not contain the word "destroying," like theirs; and hence the case is distinguishable. But in the more recent case of *Swinton v. Bailey*, *supra*, the will was made prior to the statute of Victoria, and the case was decided under the old statute like ours and it was held by the house of lords that the words "her heirs and assigns forever," through which the testator had drawn his pen, had been obliterated, within the meaning of that word as used in the statute of frauds.

Counsel for the respondent insist that the revocation here was complete within the rule followed in *Evans's Appeal*, 58 Penn. St. 238. In that case the will was executed May 24, 1856, and the last clause of it spoke of two erasures and interlineations in their places. At the same time and immediately beneath the signature of the testator, was a codicil, also signed by the testator, making two changes in the will. Then followed the attesting clause and the signature of the witnesses. On or about July 21, 1858, the testator tore through three different clauses of the will, and made three erasures, one of which was so obliterated as to be illegible; and then

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made a second codicil, explaining such alterations and revocations. This second codicil was duly signed and published by the testator in the presence of the requisite witnesses, who subscribed the same. Subsequently the testator tore the first codicil in two places, erased his signature thereto, and also erased his signature to the second codicil, and wrote beneath it the word "cancelled." The will and codicils were all upon the same sheet of paper. This paper was indorsed "Will," which was erased, and the word "cancelled" written beneath it. Independent of the writing of the word "cancelled" there can be no doubt but what the tearing of the first codicil, which was executed at the same time and was in fact a part of the original will, and the erasure by the testator of his signature thereto, and also the erasure by him of his signature to the second codicil, was a complete revocation of the will. *In re Cooke*, 5 Notes Cas. 390; *Price v. Powell*, 3 Hurl. & N. 341; *In re Simpson*, 5 Jur. (N. S.) 1366; *In re James*, 7 Jur. (N. S.) 52; *In re Gullon*, 4 Jur. (N. S.) 196; *Avery v. Pixley*, 4 Mass. 460; *Mence v. Mence*, 18 Ves. Jr. 348. The case of *Woodfill v. Patton*, 76 Ind. 375; s. c., 40 Am. Rep. 269, cites by counsel, was under a different statute, and hence is not applicable. The same is true of the recent case of *Lovell v. Quitman*, 88 N. Y. 377; s. c., 42 Am. Rep. 264. See *Gay v. Gay*, 60 Iowa, 415; s. c., 46 Am. Rep. 78; which was also under a different statute.

The learned judge writing the opinion in *Evans' Appeal* was clearly right in saying: "But to enable the will, codicil, or other writing to have such an effect (revocation), it must itself be complete, executed, and proved in the prescribed manner, namely, as a will. The other mode of repeal is something done to the will itself, something more than mere intention expressed. It must be intention to annul carried into execution by acts done to the paper. * * * Were there nothing more than the erasure of the last signature to the writing dated May 24, 1856, it would be difficult to escape from the conviction that it was an act of repeal annulling all that preceded that signature." In view of the additional facts which appeared, that the testator also tore the first codicil in two places and erased his signature from the second codicil, it would be impossible to come to any other conclusion than that he intended, by the acts named, to revoke both of the codicils and the whole will. These several acts being made with the intent to revoke, as there found, clearly amounted to a cancellation of the will; but when the

learned judge went further, and construed the word "cancelled," written thereon, and said, "I think a repeal (a revocation of the will) is effected by the act of writing upon the will itself a word that manifests an intention to annul it," he was evidently speaking for himself, and not for the court, and as it would seem in direct violation of the rule he had just expressed himself, to the effect that there could be no revocation by mere "writing," unless it "be complete, executed and proved in the prescribed manner, namely, as a will." Besides such a rule would be in conflict with a previous decision of the same court. *Lewis v. Lewis, supra*. True the learned judge attempts to distinguish that case by observing "that though the word was written upon the paper on which the will was written, it was placed where it could have been detached without defacing the instrument. It might have been separated and the will itself remained intact. In this respect it differed from the case now before us." That distinguishing element, even if it were sound, would distinguish *Evans' Appeal* from the case before us, and make *Lewis v. Lewis* applicable. The learned judge who wrote that opinion was evidently led to say what he did by what was said by the judge writing the opinion in *Warner v. Warner's Estate*, 37 Vt. 356, where the testator wrote on the back of the very paper on which a part of the will was written, and on the second page and just below some of the writing, so that it could not be separated from it, the words "This will is hereby cancelled and annulled in full, this 15th day of March, in the year 1859." Other words were written on the fourth page, and some erased, but the court held, in effect, that the will was cancelled by force of the above words. If that ruling were sound, the facts would distinguish the case from this; but giving the force of revocation to the words themselves, without being executed, attested and subscribed as required by the statute and without any tearing or burning of the paper upon which any part of the will was written, and without erasing, defacing, or obliterating any of the words of the will, or the signature of the testator or the signature of the witnesses, would seem to leave the case standing alone with nothing to support it, and in opposition to the principles maintained in some of the best adjudicated cases. Besides the case is condemned by one of our ablest text writers on the subject. 1 Redf. Wills (4th ed.), 318. The difficulty with the rule contended for is that it gives to the words written in pencil, although not attested, wit-

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nessed, nor executed in the manner prescribed by the statute, the same force as though they had been so attested, witnessed and executed, for the purpose of proving that the act of putting the words there was with the "intention" of revoking the will. It is the language, the expression by written words alone, which is thus sought to be made effectual; whereas the statute in effect declares that such written words shall have no force or effect as such unless executed, attested and subscribed as required.

The argument used by the writer of the opinion in *Evans' Appeal, supra*, and here repeated, to the effect that the word "cancelling" in the statute is used in the same sense as cancelling notes, bonds, or other written instruments, is plausible but fallacious. It is the payment, adjustment, settlement, or decree of the court which precedes the writing of the word "cancel" upon the instrument, that effects the cancellation. The word is written in such case merely as a memorandum or evidence of the previous facts which operate as a nullification. Besides such writing is generally upon the face of the instrument itself, and not upon some remote corner of the same sheet. A will, unlike other written instruments, does not go into effect until the testator's death. The mode of making a will is definitely prescribed by statute, and the mode of revoking wills is also definitely prescribed; and no essential part of the latter can be dispensed with any more than the former. So a specific mode of cancellation of tax certificates, etc., fixed by statute, furnishing no ground for holding that a will, though not included in such statutes may also be cancelled in the same way. Our statute as to the mode of revoking wills came to us with its history and the constructions which had been put upon it by the courts. In so taking it the people of the State knew what they had obtained. To change that construction by some artificial mode of reasoning is to open the door to vagueness and uncertainty, the disastrous effects of which no one can in advance determine.

But it is claimed that such intention to revoke is sufficiently proved, without resorting to the words in pencil, by the declarations of the testatrix. It is not claimed, and there is no evidence tending to show, that any of such declarations were made at the time the words in pencil were written, but on other and different occasions. Such declarations are clearly inadmissible, because they do not constitute a part of the *res gestæ*; besides, to allow them to have the force of evidence would be admitting testimony of one unsworn

and without the privilege of cross-examination. *Jackson v. Knif-fen*, 2 Johns. 31; *Waterman v. Whitney*, 11 N. Y. 157; *Staines v. Stewart*, 8 Jur. (N. S.) 440; *Boylan v. Meeker*, 28 N. J. Law, 274; *Hargroves v. Redd*, 43 Ga. 142; *Runkle v. Gates*, 11 Ind. 95. The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as will appear from the well-written and able opinion of Judge DYER in *Southworth v. Adams*, 11 Biss. 256. It has been held that where the intention to revoke had existed and been partly carried into execution, and the testator changed his mind and arrested the act of burning, tearing, cancelling or obliterating the will before its completion, leaving the will so that its contents could still be read, it might nevertheless be admitted to probate. *Doe v. Perkes*, 3 Barn. & Ald. 489; *Doe v. Harris*, 6 Ad. & El. 209; *Giles v. Warren*, 3 Eng. (Moak) 478.

So where there has been an attempt to alter certain portions of the will by erasure, without obliteration, and by substituting new words in their place by way of interlineation, and the writing thus altered failed to go into effect for want of reattestation, courts have held that there was no intent to revoke, except by way of alteration, which having failed the will remained intact as before. *Short v. Smith*, 4 East, 418; *Kirke v. Kirke*, 4 Russ. Oh. 435; *Martins v. Gardiner*, 8 Sim. 73; *Locke v. James*, 13 L. J. Exch. 186; *Jackson v. Holloway*, 7 Johns. 394; *McPherson v. Clark*, 3 Bradf. Surr. 92; *Wolf v. Bollinger*, 62 Ill. 368; *Wright v. Wright*, 5 Ind. 389; *In re Penniman's Mill*, 20 Minn. 245; *Quinn v. Quinn*, 1 Thomp. & Cook, 437; *Wheeler v. Bent*, 7 Pick. 61.

But without further discussion, which is already too extended, the judgment of the Circuit Court is reversed and the cause is remanded with direction to reverse the judgment of the County Court and to direct judgment admitting the will to probate.

BY THE COURT. Ordered accordingly.

Ordered accordingly.

FIRST NATIONAL BANK OF STILLWATER V. LARSEN.

(60 Wis. 206.)

Negotiable instrument — attorney's fee.

A provision in a promissory note, for the payment of ten per cent attorney's fees for collection, in case the principal and interest are not paid at maturity or before suit, renders it non-negotiable for uncertainty.*

SUIT on a promissory note. The head-note shows the facts. The defendant had judgment below.

W. H. McDonald, and Clapp & McCartney, for appellant.

Baker & Smith, for respondent.

TAYLOR, J. The main question in the case arises upon the objection to the evidence offered by the defendants in support of their answer. Whether the objection should have been sustained by the court below depends upon the question of the negotiability of the notes upon which the action was brought. If these notes were negotiable according to the law merchant, then as the evidence shows that the plaintiff was a purchaser in good faith and for value before they became due, the proofs offered by the defendants should have been excluded. The question of their negotiability raises two points: (1) Were they negotiable upon their face? and (2) were they negotiable when considered in connection with the chattel mortgage, which was given at the same time and as a part of the same transaction? As to both questions there is clearly a conflict of authority in other courts, and this court has not passed upon the precise questions raised upon this appeal. Upon the face of the notes they have all the elements of negotiable paper as to time and place of payment, and as to amount to be paid, unless the condition that if not paid when due and before suit brought, ten per centum attorney's fees shall be collectible in addition for collecting the same. Whether this stipulation in the notes takes away their character of negotiability is a disputed question in the courts.

*To same effect *Johnston v. Spear* (92 Penn. St. 227), 87 Am. Rep. 675, note. *Contra: Trader v. Chidester* (41 Ark. 242), 48 Am. Rep. 88; *Poyser v. Cole*, post.

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This question was referred to by Justice LYON in the opinion in the case of *Morgan v. Edwards*, 53 Wis. 599; s. c., 40 Am Rep. 781, and the cases sustaining the different views of the courts were cited upon the argument of that case, but the precise point raised in this case was not determined. This court held in that case that where there was a stipulation to pay expenses of collection, which expenses might as well be demanded when the collection was made at the time the note became due, as when collected after due, such stipulation necessarily rendered the amount to be paid on the instrument uncertain, and so rendered the paper non-negotiable.

In the case at bar there is no uncertainty as to the amount which will pay the notes in suit, if payment be made before or at the time the same become due or before suit brought, and if the stipulation to pay ten per cent for collection renders the amount uncertain, it only renders it so after the note is past due, and when an action is brought to collect the same. Whether this stipulation renders uncertain the amount recoverable upon the notes in question, depends, first, upon the question whether the stipulation is valid for any purpose, and second, whether the amount stipulated to be paid is conclusive upon the parties as to the amount which may be recovered for such costs. This court has repeatedly held that a stipulation in a mortgage to pay attorney's or solicitor's fees, other than the taxable costs, in case it becomes necessary to foreclose the same, is not void and will be enforced when the amount stipulated to be paid is reasonable. See *Boyd v. Sumner*, 10 Wis 41; *Rice v. Cribb*, 12 Wis. 179; *Hitchcock v. Merrick*, 15 Wis. 522; *Mosher v. Chapin*, 12 Wis. 453; *Tallman v. Truesdell*, 3 Wis. 443; *Reed v. Catlin*, 49 Wis. 686, 691. The amount therefore fixed by the parties is not conclusive upon the defendant, and the amount to be recovered under such a stipulation must be fixed by the court or jury on the trial of the action.

In some of the States, viz., in Michigan and Kentucky, such stipulations are held void as contrary to public policy and the statutes regulating costs recoverable in actions. See *Bullock v. Taylor*, 39 Mich. 157; s. c., 33 Am. Rep. 356; *Witherspoon v. Mussleman*, 14 Bush. 214; s. c., 29 Am. Rep. 404. In other States they are held binding, and as this court has held them valid in case of mortgages, to be consistent, they must be held valid when applied to the collection of money on notes or securities other than mortgages. It must be admitted therefore that a stipulation of this kind does

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render the amount recoverable on the notes uncertain when an action is brought upon them in this State. When the amount recoverable in an action upon a written contract, whether in the form of a promissory note or otherwise, is uncertain, such instrument is not negotiable, is held by most of the courts which have considered the question.

In the opinion of the Supreme Court of Pennsylvania in *Woods v. North*, 84 Penn. St. 407, Justice SHARSWOOD, who delivered the opinion in that case, says: "But in the paper now in question there enters as to amount an undoubted element of uncertainty. It is a mistake to suppose that if this note was unpaid at maturity, the five per cent would be payable to the holder by the parties. It must go into the hands of an attorney for collection. It is not a sum necessarily payable. The phrase 'collection fee' necessarily implies this. Not only so, but this amount of percentage cannot be arbitrarily determined by the parties. It must be only what would be a reasonable compensation to an attorney for collection. This in reason and usage of the legal profession, depends upon the amount of the note. * * * How then can this note be said to be certain as to its amount, or an amount unaffected by any contingency? Interest and costs of protest, after non-payment at maturity, are necessary legal incidents of the contract, and the insertion of them in the body of the note would not affect its negotiability. * * * But a collateral agreement, as here depending, too, as it does, upon its reasonableness, to be determined by the verdict of a jury, is entirely different. * * * If this collateral agreement may be introduced with impunity, what may not be?" To the same effect upon the same point are *Garretson v. Purdy*, (Dakota), 14 N. W. Rep. 100; *Jones v. Radatz*, 27 Minn. 240; *First Nat. Bank v. Gay*, 63 Mo. 38; s. c., 21 Am. Rep. 430; *Hardin v. Olson*, 14 Fed. Rep. 705; *First Nat. Bank v. Bynum*, 84 N. C. 24; s. c., 37 Am. Rep. 604.

In a late case in the Supreme Court of Maryland the rule laid down in the cases above cited is approved and followed, after a full consideration of the cases holding a contrary doctrine. *Maryland F. & M. Co. v. Newman*, 60 Md. 584; s. c., 45 Am. Rep. 750. In this case, the court say, that to constitute a note negotiable under the law merchant, it is essential that the promise must be "to pay a certain sum of money unconditionally." The court further says: "It is of great importance to the use and office of such commercial

negotiable instruments as bills and notes, that they should be kept free of all conditions, and singular and unusual stipulations, such as we find on the face of the note in question, whereby their negotiability might be seriously clogged or impeded. * * * In the note declared on in this case, the stipulation for the payment of all costs and charges incurred in the collection of the note introduces an element of uncertainty quite inconsistent with the degree of certainty required as to the sum to be paid. The costs and charges of collection could never with accuracy be known until the collection had been made complete; and hence by computing the certain sum mentioned in the note with that which is uncertain, and treating the note as an entire contract, it is for an uncertain sum, and therefore uncertain on its face as to the amount proposed to be paid. This as we have seen, is not allowable in notes intended to be negotiable."

The condition in the note in question in the case in the Maryland court was as follows, after promising to pay a certain fixed sum on a day certain: "And if not paid when due, promised and agreed to pay all costs and charges for collecting the same, with interest." The effect of the condition in the notes in the case at bar is the same as in the Maryland case, for although the condition is to pay "ten per cent for collection fee," yet this stipulation as to collection fee must be construed, according to the rule laid down by this court, to mean a reasonable collection fee not exceeding ten per cent, and so becomes just as uncertain as the stipulation in the Maryland case and the other cases above cited.

The following cases hold that a stipulation in a note to pay collection fees, either of designated or uncertain amount, in case suit be brought to recover the amount due on the note, does not take away its negotiability. *Stoneman v. Pyle*, 35 Ind. 103; s. c., 9 Am. Rep. 637; *Wyant v. Pollorf*, 37 Ind. 512; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scoville*, 18 Kans. 433; s. c., 26 Am. Rep. 779; *Dietrich v. Bayler*, 23 La. Ann. 767. These last cases place their decisions upon the ground that it is sufficient if the amount is certain which will discharge the note if paid when due, and that any stipulation, which renders the amount uncertain only in case payment is not made until after the same is past due, does not take away the negotiability of the note.

We think the rule laid down by the courts which hold the notes not negotiable when the amount recoverable by action is not certain

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and fixed is the better rule, and that the public interests require that negotiable promissory notes should not be connected with other collateral agreements which render the amount recoverable thereon uncertain. If the interest of manufacturers and vendors of manufactured articles require the taking of instruments of the kind in suit in this case, they should be compelled to take them subject to all the equities which exist between the parties, and they should not be permitted to avoid those equities by treating them as negotiable notes. If they embody in them stipulations or agreements which are not negotiable, it is but just to hold the whole instrument not negotiable.

In this view of the case it becomes unnecessary to decide what effect, if any, the stipulation in the chattel mortgage, that if the first note was not paid when due the other two should become payable immediately thereafter, would have upon the negotiable character of the notes, nor whether the holder of the notes is in a situation to avail himself of that stipulation in an action at law to recover the amount due on the notes. Holding the notes were not negotiable upon their face, we may admit, for the purposes of this appeal, that the action was not prematurely brought upon the second and third notes; and still it follows that the court did not err in permitting the defendants to prove their defense to the plaintiff's action.

[Minor question omitted.]

We find no errors in the record which would justify this court in reversing the judgment.

By THE COURT.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

BATES V. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

(60 Wis. 295.)

Garnishment — corporation — common carrier.

Where garnishment process is served upon one agent of a corporation while the property is in the actual possession of another agent, if the latter delivers the property to one authorized to receive it before the officer served can with reasonable diligence notify the other, the corporation is not liable.

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Property outside the State may not be garnished.

It seems, a common carrier is not subject to garnishment for goods in actual transit at the time of service of process.

GARNISHMENT proceedings. The opinion shows the points. The plaintiff had judgment below.

Fuller & Fuller, John W. Cary and H. H. Field, for appellants.

Robert F. Pettibone, for respondent.

TAYLOR, J. After a careful consideration of the facts and the arguments of the learned counsel for the respective parties we have concluded that the learned Circuit judge erred in refusing to instruct the jury as requested by the appellant, and also in rendering judgment in favor of the respondent upon the special verdict.

1. It seems to us very plain that where the law authorizes the service of a garnishee summons upon an officer of a corporation who has not in his actual possession the property sought to be reached by such process, but such property is in the possession of some other officer or employee of the company and such other officer or employee delivers such property to a person authorized to receive the same before he can, with reasonable diligence on the part of the officer served, be notified to retain the possession thereof, such service is not sufficient to charge the corporation as garnishee. Nor do we think the officer served is under obligation to use extraordinary diligence in notifying the officer or other employee in charge of the property of the service of the process. He is bound to use reasonable diligence in respect to the matter, and if by the use of reasonable diligence notice cannot be given to the person in the actual possession of the property before it has lawfully passed from the possession of the corporation, the corporation cannot be held liable as garnishee in respect to such property.

In this case the garnishee summons was served at an unusual time, five o'clock in the morning, on the 2d of March, at a time when the officer was probably in his bed, upon an officer who, as the evidence shows, had no knowledge of the fact that the company had any property of the defendant in its possession and whose business did not require him to have any knowledge upon that subject; and so far as the evidence in this case shows he had at hand no ready means of ascertaining the fact that it had any property of defendant in its possession; and within two and one-half hours of

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the service of the process upon such officer of the company the property sought to be reached by the proceeding was without notice delivered to the person entitled to receive the same under the contract by which the company held possession of it when the summons was served, at a place nearly a hundred miles from the place where the officer was served with the summons. We think that as a question of law the service was insufficient to charge the company as garnishee.

We think the rule applicable to the notice which must be given by the vendor to stop goods *in transitu* should apply to a case of this kind. The rule applicable to such cases is well stated by PARKE, B., in *Whitehead v. Anderson*, 9 Mees. & W. 534. He says: "If notice be given to the principal whose servant has the actual possession of the goods, it must be given at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servant to the vendee, when it was impossible, from the distance and want of means of communication, to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery." It seems to us that it would be the height of injustice to hold the railroad company liable as garnishee for goods which their servants and employees have delivered to the consignees entitled to receive them, having no notice at the time of making such delivery that any garnishee process had been served, and before a reasonable time had elapsed after the service upon a distant officer of the corporation, within which notice could have been given to stop such delivery. To hold the company liable in such case would do violence to the statute which directs that "the court shall render such judgment in all cases as shall be just to all the parties, and properly protect their respective interests," etc. R. S., § 2766. The rule above stated was held applicable to the garnishee process by the Supreme Court of Massachusetts, in *Spooner v. Rowland*, 4 Allen, 485. In this case it was held that the service of the process on the secretary of an insurance company in Boston, to attach money due on an insurance policy, was insufficient, when it appeared that three hours

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after the service the agent of the company paid the loss at Worcester to the claimant, without actual notice of the process.

2. Notwithstanding the general language of our statute upon the subject of garnishment, that "any creditor shall be entitled to proceed by garnishment, in the Circuit Court of the proper county, against any person (except a municipal corporation) who shall be indebted to or have any property whatever, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions, and in the manner prescribed in this chapter" (R. S., § 2752), we feel constrained to hold that the personal property or real estate in his possession or under his control must be limited to personal property or real estate within this State, and that in the absence of any fraud or connivance on the part of the garnishee to aid the debtor in defrauding his creditors, personal property or real estate which is lawfully in the possession or under the control of the garnishee outside of this State is not the subject of garnishment under our statute. That personal chattels outside of the State, which if within the State could be seized by attachment or execution, were not intended to be covered by the statute, is, we think, evident.

The attachment of the debtor's property before judgment has always been considered a harsh remedy in this State, but that writ can only reach the property of the debtor within the State. R. S., § 2738. The garnishee process is in the nature of an attachment, and was first used to attach the credits of the debtor and apply them to the payment of his debts, but it has been extended in this State so as to attach, without actual seizure, the personal property and real estate of the debtor in the possession or under the control of third persons, so as to apply such property to the payment of his debts. We do not feel called upon to give this statute, which is in its nature a harsh remedy, a construction which would give the courts under it the highest powers of a court of chancery, viz., the power to compel a debtor to surrender his property held within a foreign jurisdiction, to be applied to the payment of his debts within this State. If under this statute the Circuit Court can exercise this power, then any justice of the peace may, for the same language is used in the statute which gives the power to justices' courts over the garnishee process that is used with respect to Circuit Courts, except that it leaves out the words "or real estate." As to personal property the language is the same. R. S., § 3716

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The statutes of this State, considered together and as one system, clearly indicate that the personal property which may be arrested in the hands of a garnishee must be within the State, so that it may be seized and sold to satisfy any judgment obtained against principal debtor. Section 2762, R. S., relating to the proceedings in the Circuit Court, says: "If the answer disclose any money, credits or other property, real or personal, in the possession or under the control of the garnishee, the officer having a writ of attachment or an execution, if any, may levy upon the interest of the defendant in the same; otherwise the garnishee shall hold the same until the order of the court thereon." The last clause of the section evidently relates to the cases where the garnishee is summoned in an action not commenced by attachment, and in such cases he must hold the property to await the judgment of the court in the principal action. The act giving jurisdiction of the proceedings to justices of the peace provides as follows: "The justice shall enter an order in his docket requiring the garnishee, within ten days, to pay or deliver to the justice such property, or the amount of such indebtedness, or so much thereof as may be necessary to satisfy such judgment; * * * and all property and effects, except money delivered to the justice, shall be by him ordered to be sold on the execution against the defendant." R. S., § 3725.

These provisions clearly indicate that the personal property to be reached in the hands of a garnishee is such as would be subject to seizure by the writ of attachment or execution, if they were in the possession of the principal debtor. It is unnecessary to intimate the difficulties and hardships which would result from the enforcement of a rule against garnishees compelling them to deliver up to the processes of the courts of this State any property they may have under their control, belonging to the principal debtor, situated in another State. The difficulty in the case at bar might not be great, because the property, although in fact out of the State when the garnishee summons was served, was not as distant from the place where the court was held which issued it, as it might have been within the State. But the rule, if established, must be general, so that if property just beyond the line of the State may be reached, then property in Maine, Louisiana or California, or in any foreign country may also be reached and held. The difficulties and injustice of enforcing such a rule are apparent. The only case cited by the learned counsel for the respondent in which any court has

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held that personal property out of the State, in which the garnishee process was issued, could be reached and held by it, is *Childs v. Digby*, 24 Penn. St. 23. That case was disapproved as bad law by the same court in *Penn. R. Co. v. Pennock*, 51 Penn. St. 244. The position taken by us upon this question is approved by the Pennsylvania court in the case last cited, and also in the following cases: *Western R. v. Thornton*, 60 Ga. 300; *Sutherland v. Second Nat. Bank*, 73 Ky. 250; *Wheat v. P. C. & Fl. D. R. Co.*, 4 Kana. 370, 378; *I. C. R. Co. v. Cobb*, 48 Ill. 402; *Lawrence v. Smith*, 45 N. H. 533; *Tingley v. Bateman*, 10 Mass. 343, 346; *Clark v. Brewer*, 6 Gray, 320; *Young v. Ross*, 31 N. H. 202.

It is urged by the learned counsel for the respondent that the garnishee should be held for property in his control out of the State, because the court could enforce its order against the person of the of the garnishee, over whom it has jurisdiction, in like manner as a court of equity sometimes enforces a contract between the parties to the action to convey lands situated in another State. Our answer to that argument is, as stated above, that it is clear that the legislature did not intend to confer these high equity powers upon the courts having jurisdiction of the garnishee process. It is unnecessary therefore to discuss the question of the power of the legislature to confer upon the courts of this State the authority to appropriate the personal property or real estate of a debtor, situate in another State or foreign country, to the payment of his debts in this State.

3. Another question of very great importance to all common carriers, and especially to all railroad companies within this State, was very fully discussed by the learned counsel for the respective parties orally and in their briefs; and although not absolutely necessary to a determination of this appeal, we deem it highly proper to consider it in this case. The exact question is this: Can a common carrier be held liable upon a garnishee summons, for personal chattels in his possession in actual transit at the time the summons is served?

We think that public policy and the proper discharge of the duties imposed upon common carriers of personal chattels placed in their possession for carriage, requires that this question should be answered in the negative; and we think so, notwithstanding the very broad language of the statute above quoted. That railroad corporations as well as individuals and other corporations are sub-

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ject to the garnishee process must be admitted, and that in proper cases they must be held to respond as individuals. This court has so held as to debts due from the railroad company to the principal debtor in the action. The nature of the possession and control which the railroad company has of and over personal property in actual transit; the interruption of business and the general inconvenience which must necessarily result from holding such property the subject of the garnishee process, it appears to us are amply sufficient to justify us in making such property an exception to the general rule, in the absence of any positive declaration of the legislature subjecting such property to the process. Notwithstanding the general language used in statutes of this kind, the courts have established many exceptions depending upon the nature and character of the possession and control which the person or corporation proceeded against has over the property in his or its possession. This court has established many exceptions, where it is admitted the language of the statute was broad enough to include the corporations or officers excepted by the courts. *Burnham v. Fond du Lac*, 15 Wis. 193; *Hill v. La C. & M. R. Co.*, 14 Wis. 291; *Buffham v. Racine*, 26 Wis. 449; *Merrell v. Campbell*, 49 Wis. 535. So this court, as well as others, has made exceptions, and taken cases out of the general words of the statute on account of the nature of the indebtedness of the garnishee which is sought to be reached by the garnishee process. Thus, where the debt sought to be reached is in the form of a negotiable promissory note or bill of exchange, the debtor is not held chargeable as garnishee except under a showing of facts which will clearly protect him against the actual holder of the note or bill. *Carsom v. Allen*, 2 Pin. 457; *Davis v. Pawlette*, 3 Wis. 300; *Mason v. Noonan*, 7 Wis. 609; *State v. Burton*, 11 Wis. 50; *Deek v. Cole*, 16 Wis. 95. These cases are abundant to show that where the public good requires it, or when it is necessary to protect the rights of the garnishee, the courts have not hesitated to say that the general words of the statute should be construed not to include the party or the particular subject-matter of the controversy.

The Supreme Court of Massachusetts, in the case of *Stanleys v. Raymond*, 4 Cush. 314. held that a person might have the possession or control of the property of another for the time being, and yet not be subject to the trustee process of that State. In that case the defendant was sought to be charged as

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trustee as to a cow he had in his possession under the following circumstances: he had been negotiating with the owner for her purchase, and had taken her into his possession for trial; but before the trustee process was served he had notified the owner he would not take her, and at the request of the owner she remained in his possession at the time the process was served. In deciding that he was not liable to the process, the court, after stating that there was some doubt whether the possession of the defendant was within the literal construction of the statute, say: "But if it were so, such a construction would be unreasonable and inadmissible, for thereby an innkeeper would be chargeable with the property of a traveller which he might have in his possession for the shortest time; and the hirer of a horse for a ride might be charged as trustee." And again, after showing that courts are bound to give such a construction to a statute as would be reasonable, they say: "We think it never could have been the intention of the legislature that the mere possession of property by a party having no claim to hold it against the owner, should render him liable as trustee, and thereby subject him to trouble and expense in answering to a claim in which he has no interest. Such a construction of the statute would be prejudicial in very many cases, and cannot be admitted." The reasoning of the court in this case applies with great force to the common carrier, especially the carrier by railroad. If he is made a garnishee for property in actual transit, he is not only made a party to a controversy in which he has no interest, and is necessarily put to trouble and expense for which he can get no compensation, but he is also necessarily interfered with and interrupted in the prompt carriage of the goods of many others having no connection with the controversy. We think when the legislature gave the garnishee process in an ordinary action upon contract before judgment, and where there is no allegation of any fraudulent attempt on the part of the debtor to defraud his creditors, it could not have contemplated that it would be used for the purpose of interfering with the business of railroads and other common carriers in the prompt performance of their duties to the public; and when the plaintiff, upon allegations of fraud, proceeds by writ of attachment against the property of his debtor, he should take the risk of the actual seizure of the defendant's property if found in the hands of the carrier, and assume the risk as well as the expense of establishing the ownership of the property by the defendant, and not be

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allowed to cast that risk and expense upon the carrier by summoning him as garnishee.

There are but few decisions of the courts upon this subject. We have been referred by the learned counsel for the respondent to the case of *Adams v. Scott*, 104 Mass. 164, as sustaining the right to hold, by garnishee process, goods in the hands of a common carrier while *in transitu*. It must be admitted that the court so held in that case. It was a very plain case. There was no dispute about the ownership of the property, and the property at the time of the service seems to have been not in actual transit, but in the hands of an agent of the company in the city of Boston. Still it is quite plain that the court held that the fact that the property was in the hands of a common carrier in transit, was no objection to the proceedings. This is the only case we have found which sustains the doctrine contended for by the respondent. On the other side the learned counsel for the appellant have cited us the cases of *I. C. R. Co. v. Cobb*, 48 Ill. 402, and *Michigan, etc., R. Co. v. Chicago, etc., R. Co.*, 1 Bradw. 399, which sustain the contrary doctrine, and hold that chattels in the hands of a common carrier *in transitu* are not the subject of garnishment. The doctrine of these cases has some support in the cases of *Penn. R. Co. v. Pennock*, 51 Penn. St. 240, 254, and *Western R. v. Thornton*, 60 Ga. 300. We approve what was said by Chief Justice BREESSE in the case of *I. C. R. Co. v. Cobb*, *supra*, about the injustice of holding the common carrier as garnishee in respect to property in actual transit, viz.: "They are obliged under ordinary circumstances to carry all that shall be delivered to them, and they discharge their duty by carrying and delivering according to the contract. It is not their business, nor is it their interest, to know to whom the various articles belong, nor should it be required of them that conflicting claims to the property intrusted to them should be adjusted through controversies in which they have no interest, and the burden, annoyance and expense of which they must bear. When the goods are in the depot of a railway company in the county in which the attachment proceedings are instituted there could perhaps be no objection to such process; but on this point we express no definite opinion. When the property has left the county and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation and trouble of such process, merely because it had received to

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be carried that which the law compelled them to receive and carry."

Whether goods in a depot of a railway company in this State, either before transit or after, and awaiting delivery after their arrival at the place of delivery, would be subject to the garnishee process, we do not determine.

For the reasons stated the judgment of the Circuit Court must be reversed.

BY THE COURT. The judgment of the Circuit Court is reversed and the cause remanded with instructions to that court to enter a judgment upon the special verdict in favor of the garnishee defendant.

Judgment reversed.

McGRAFT V. RUGEE.

(80 Wis. 408.)

Factor — lien — evidence — burden of proof.

A factor has no lien on the goods of the principal when the balance of account is against the factor, and the factor's advances will be presumed to have been in liquidation of such balance

If a factor asserts that a balance against him is due to losses for which he is not responsible, the burden of proof is on him.

REPLEVIN. The opinion shows the points. The plaintiff had judgment below.

Colzhausen, Sylvester, Schreiber & Jones, for appellant.

Johnson, Rielbrock & Halsey, and L. N. Keating, for respondent.

CASSIDAY, J. An agent employed to sell, or to purchase and sell, goods or other personal property intrusted to his possession, by or for his principal, for a compensation, commonly called factorage or commission, may properly be regarded as a factor. Story Agency, §§ 33-34; Edwards Factors, § 1; Whart. Agency, § 735. Here the duties, powers and compensation of the factors and their relation to their principals were originally regulated by agreement.

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True, there were some departures after the business had continued for a while. but there is nothing to indicate any change as to the title of the property, or the measure or source of compensation. Undoubtedly a factor is entitled to retain goods in his possession as such until his advances, expenses and commissions are paid, and this right is not limited to charges on the particular consignment of goods, but covers a general balance on the accounts between the factor and the principal, so far as concerns the business of factorage. *Whart. Agency*, § 767; *Edwards Factors*, §§ 71, 72; *Story Agency*, § 376; *Matthews v. Meneulger*, 2 McLean, 145; *Bryce v. Brooks*, 26 Wend. 374; *Kruger v. Wilcox*, 1 Amb. 252; *Jordan v. James*, 5 Ohio, 99; *Weed v. Adams*, 37 Conn. 378. The statute of this State in this respect would seem to be in confirmation of the common law. R. S., § 3345.

But where the general balance on the accounts of the factorage is largely against the factor and in favor of the principal the former can have no lien upon the property in his possession, for he has no enforceable claim. *Godfrey v. Furzo*, 3 P. Wms. 185; *Ziack v. Walker*, 2 W. Bl. 1154; *Hollingworth v. Tooke*, 2 H. Bl. 501; *Walker v. Birch*, 6 Term, 258; *Weed v. Adams*, *supra*; *Jordan v. James*, *supra*; *Enoch v. Wehrkump*, 3 Bosw. 398; *Beebe v. Mad*, 33 N. Y. 587. In such case the factor's right of retention and sale is merely to reimburse himself for the balance, his due on the general account of the factorage. *Brown v. M'Gran*, 14 Pet. 479; *Overton Liens*, § 105. Neither can a factor who is indebted to his principal on account of previous sales acquire a particular lien upon goods subsequently sent to him for sale, for expenses incurred on account of them, unless such expenses exceed the amount of his indebtedness. *Edwards Factors*, § 72; *Enoch v. Wehrkump*, *supra*. The lien of an agent and factor on the goods of his principal for specific expenses does not exist when the general balance of account is against him. *Ibid.* We must therefore hold that where a factor is largely indebted to his principal on account of the factorage and thereupon voluntarily makes advances in the business not exceeding such indebtedness, such advances, being made for and in behalf of his principal, must be deemed to have been so made by the factor in liquidation of his own indebtedness *pro tanto*.

Here by special agreement, the commissions of the factors were limited to the net profits of the business. There is however nothing to indicate that there were any such profits, but the reverse. The

court moreover found that at the time of the levy, the factors were largely indebted to the plaintiffs upon the general account of their business as factors, after crediting them with all advances made by them or either of them in the business. We cannot upon the evidence disturb this finding. The fact stands confessed, that the general balance against the factors and in favor of the plaintiffs was upward of \$26,000. We are asked to assume that this wide discrepancy was owing to losses for which the factors were in no way at fault, and hence in no way responsible, merely because the plaintiffs, after the commencement of this action, turned over to the factors the outstanding credits and accounts of the business, amounting it is said, to \$2,500. The true value of such credits and accounts does not appear, but assuming that they were worth what is claimed, yet that fact is insufficient to change the character of the general balance against the factors. If this large balance against the factors was owing to losses for which they were not responsible, but which should have fallen upon the plaintiffs, then the burden of proving such facts was upon the defendants. They have failed to make such proof, and we are not at liberty to supply it by mere inferences, and remote at that.

Had the evidence shown a general balance due the factors, still it would have been a grave question whether it could have been reached by an execution against the factors being levied upon the lumber, shingles, lath, etc., in their possession as such factors. Whart. Agency, § 757, and cases there cited; *U. S. v. Villalonga*, 23 Wall. 42; *Jordan v. James*, 5 Ohio, 99. These authorities in effect hold that the factor's right, although sometimes called a special property, yet is never regarded as a general ownership. It is liable to be defeated at any time by the principal paying advances made and liabilities incurred, and reclaiming possession of the property. The factor's right, at most, is nothing more than the ownership of a debt secured by a lien or charge upon the property in his possession. It would seem therefore that such debt can at least be more appropriately reached by some other process. But it is unnecessary here to determine the question, and hence we reserve it for future consideration.

BY THE COURT. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Hoverson v. Noker.

HOVERSON v. NOKER.

(60 Wis. 511.)

Parent and child — ratification of tort.

A father, knowingly permitting his young children to commit acts on his premises likely to cause injury to travellers passing, is responsible therefor, although he did not by words command such acts; and so, his knowledge that they had done such acts on previous occasions may be proved. (*See note, p. 888.*)

ACTION for personal injuries. The opinion states the case. The plaintiff had judgment below and appealed.

R. L. Wing and Timlin & Manseau, for appellants.

Nash & Nash, for respondent.

TAYLOR, J. The plaintiffs in this action are husband and wife, and the defendants are father and his two sons. The action was in the nature of an action on the case for an injury to the wife, caused, as alleged in the complaint, by the joint acts of the defendants.

The evidence given on the trial shows pretty clearly that while the plaintiffs were passing along the highway with their team and wagon, in front of the defendant's house, on a Sunday, going to church, the two young sons of the defendant Frank Noker came out of their father's house and fired off a pistol and shouted, and so frightened the plaintiffs' horses that they jumped suddenly forward and threw Sarah Hoverson out of the seat and injured her; and in the afternoon, on their return from the church, the boys again fired the pistol and shouted and again frightened the plaintiffs' horses, but did not injure Mrs. Hoverson to as great an extent as in the morning.

The jury under the instructions of the court, found a special verdict, and assessed the plaintiffs' damages at the sum of \$5. From the judgment entered on such verdict Sarah Hoverson appeals to this court.

The case though not involving any great amount of money, has been argued by counsel orally and in the submitted briefs with a degree of ability and care highly commendable.

The learned counsel for the appellant presents several points upon the rulings of the court upon the trial rejecting evidence offered by him, for which he claims the judgment should be reversed. It will be seen by an examination of the record that it became important for the plaintiffs to connect the father with the acts of his young sons, which the plaintiffs alleged caused the injury complained of, and for this purpose the plaintiffs offered evidence tending to prove that the sons had frequently, before the day upon which the accident happened, called abusive names, shouted, and frequently discharged fire-arms when persons were passing the house of the defendants, and that this was often done in the presence of their father. All evidence of this kind was excluded. This, we are inclined to hold, was error. If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which in its nature was likely to result in damage to those passing, and when an injury did happen from that cause, he was not only morally but legally responsible for the damage done. If a parent permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not in words order the erection to be made. If he made it himself, with the intention to frighten passing teams, he would be responsible for the injury caused by it; and when he permits his irresponsible children to do it, he is equally liable, because he has the control of his premises as well as of the children, and is bound to restrain them from causing a dangerous thing to be erected on his premises near the highway; and permitting his young sons to become an object of fright to teams passing, is certainly equally if not more reprehensible than permitting an inanimate structure to be placed where it would cause such fright. We think the evidence ought to have been admitted in order to connect the father with the acts of the young sons which caused the injury when the plaintiffs were on their way to church in the morning, as well as when on their return from the church in the afternoon.

[Minor question omitted.]

The nonsuit in favor of the father upon the first cause of action

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stated in the complaint was, we think, improperly granted, even upon the evidence admitted by the court. There was at last some evidence admitted upon which the jury might have held the father liable for the acts done in the morning. On the case made by the plaintiffs, under the too strict rule held by the court as to the admission of evidence, there was still enough to carry the case to the jury upon both the causes of action stated in the complaint; at least, so far as the father was concerned.

The exceptions to the rulings as to the form of the special verdict need not be considered, as there must be a new trial for the errors above suggested. We deem it proper however to say that the judge, in his instructions upon the following question submitted to them, "Did the defendant Frank Noker direct his sons, the other two defendants, to make the noise they did when the plaintiffs were passing the house with their team?" fell into an error when he instructed them "that in order to answer this question in the affirmative they must be satisfied from the evidence that he by word so directed his sons to make the noise." This was too strict a limitation upon the subject. The evidence might have satisfied the jury that he directed the act of his sons, but they might be unable to find evidence that he did so direct it by express words of command. Certainly no express command to do as they did was necessary to hold the father liable for their acts.

For the errors mentioned the judgment must be reversed.

BY THE COURT. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Judgment reversed.

NOTE BY THE REPORTER.—Mr. Schouler, Dom. Rel., § 263, says: "On the whole it may be stated as a rule that a father is not liable in damages for the torts of his child, committed without his knowledge, consent or sanction, and not in the course of his employment of his child."

In *Moon v. Towers*, 8 C. B. (N. S.) 611, the father was held not to be liable for false imprisonment at the suit of his son merely by his knowledge that the suit had been begun and the defendant in it had been remanded, and by his saying that he would not interfere.

In *Tift v. Tift*, 4 Denio, 175, it was held that a father is not liable for the willful act of his minor child in setting the father's dog on the plaintiff's hog. BARNESON, Ch. J., said: "The defendant was not answerable for the act of his daughter, done in his absence and without his authority or approval, but the daughter, whether an infant or not, was answerable for her own trespass." Citing *McMonus v. Orickett*, 1 East, 106; *Poster v. Essex Bank*, 17 Mass. 479, 500.

In *Schlossberg v. Lehr*, 60 How. Pr. 450, N. Y. Com. Pl., Special Term,

Tift v. Tift, was followed. The court said: "In *McPherson on Infants*, 496, the cases in which an adult is liable for the trespasses of an infant are limited to those in which the injury is done by the infant, without malice, through the negligence of the adult." "There is no case in the courts of this State which holds that both the infant and the parent are liable," etc.

In *Edwards v. Crume*, 13 Kans. 348, an action for negligently setting a prairie on fire, the court said: "The main question in this case is, whether a father is liable in a civil action for damages for the wrongful acts of his minor son where the son lives with the father and is under his control, but where the acts complained of were not authorized by the father, were not done in his presence, had no connection with the father's business, were not ratified by him, and from which the father received no benefit. We must answer this question in the negative. The father in such a case is not liable. *Baker v. Haldeman*, 24 Mo. 219; *Tift v. Tift*, 4 Denio, 175; *Moon v. Towers*, 8 C. B. (N. S.), 611; s. c., 98 Eng. Com. Law, 611; *McManus v. Crickett*, 1 East, 106. In such a case the son alone is liable. Suppose a minor son, fifteen or twenty years of age, should steal a horse, or rob a bank, and abscond with the proceeds of his larceny, does any one suppose that the father would have to answer therefor, either civilly or criminally? The minor alone would be liable, and he would be liable both civilly and criminally."

The like was held in *Wilson v. Gaward*, 59 Ill. 51, an action of trespass by children in maltreating hogs, in crossing lands to go to school. The court said: "It would be unjust to hold the father responsible for the purely mischievous and willful conduct of the children." *Paulin v. Houser*, 63 Ill. 312, was very similar. The court said: "This instruction is not based upon the evidence. So far from there being evidence that appellant had previously directed his son to set the dogs after appellee's hogs, they both swear that no such directions were given; that he, on a previous occasion, simply directed that the boy turn the hogs out of the inclosure. Yet this instruction assumes there was such evidence in the record. It was calculated to mislead, and on the slight evidence in the case, it no doubt did mislead, as with such evidence there would have been a very different question presented. It might be that the jury could have presumed, had there been evidence that appellant had, on a previous occasion, directed his son to set the dogs after the hogs, that he had a general authority to do so, but even had there been such evidence, it was not the province of the court to determine and tell the jury what it proved. That was for the jury."

In *Chandler v. Deaton*, 37 Tex. 406, an action for shooting mules, the court said the father could not be held unless he was "in some way implicated as principal or accessory," or "counselled or abetted his sons," "or if he concealed the offense, knowing it to have been committed, he might be liable in a criminal prosecution; and there may be some doubt whether concealing a knowledge of the act might not be so far regarded as approving and adopting the act of his sons as to make him liable in damages. This question however does not arise in the case," etc.

In *Baker v. Haldeman*, 24 Mo. 219, held that a father is not liable for his minor child's assault. The court below instructed that "unless the plaintiff

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has established that the boy was of a vicious disposition and habits, and that the father knew it at the time, he is not responsible," etc. The jury found for the defendant. This was affirmed, the court holding however that this instruction was erroneous.

In *Paul v. Hummel*, 43 Mo. 119, the same theory was advanced and discarded, on the authority of *Baker v. Huldeman*. In this case the defendant had been notified of the child's bad and vicious temper, but the court said: "A parent cannot be held liable for the willful trespasses and torts of his infant children, when he neither assents to nor ratifies them. "There is no such relation existing between father and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than acts of any other person."

In *Newsom v. Hurt*, 14 Mich 233, replevin for a horse, held that when a minor son takes up an estray, without the consent or knowledge of his father, he is a trespasser, and a subsequent retention by the father confirms the trespass merely, and does not found title to the property. The court said: "If the father, seeing the property running at large, and observing and deciding for himself upon the propriety of taking it up, had directed the son merely to execute the act, this would have been the act of the father and not of the son, and the plaintiff would have had in this respect the protection which the statute intended to give him. But the propriety of the act was decided upon by the son, and the horse seized in the absence of the father, and without his knowledge or consent. The father had no right to substitute the information, judgment and discretion of the son for his own." Judgment for plaintiff. MARTIN, Ch. J., dissented, holding that the father had ratified the son's acts. "If he had repudiated the act of the son, and turned the horse loose upon hearing of the son's act, the rule would be different."

In *Beedy v. Redding*, 16 Me 363, the court said "The minor sons of the defendant, being at the time members of his family, with the defendant's team at three several times hauled away the defendant's wood. This could hardly have been done without the defendant's knowledge, if it had not his approbation. It was his duty to have restrained them from trespassing on his neighbor's property *Qui non prohibet, cum prohibere possit, jubet*, and this maxim may be applied with great propriety to minor children residing with and under the control of their father. If he had caused them to carry the wood back, when the fact came to his knowledge, if he did not know it at the time, he would then have done his duty to his children and to his neighbor. Considering the relation in which he stood, and the repeated use of his team in getting the wood, it would not be easy for him otherwise to escape legal liability upon a just view of the facts."

In *Strohl v. Levan* 39 Penn St 177 it was held that trespass will lie against a father for an injury by his team driven by his son with whom he was riding, but the question of liability in the circumstances is for the jury. The court said The father "made no objection or endeavor to control his son, and if he did not, it was a presumption which a jury might well make, and which I think they were bound to make, that he assented to what was done in the management of the instrument (the team) which did the injury," etc.

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In *Lashbrook v. Patten*, 1 Duv (Ky.) 316, *held*, that a father is liable for injuries by the negligence of his minor son in driving the father's team with his approbation. This was put on the ground of service: "the son must be regarded as in the father's employment, discharging a duty usually performed by a slave, and therefore must, for the purposes of this suit, be regarded as his father's servant."

See *Teagarden v. McLaughlin*, 86 Ind. 476; s. c., 44 Am. Rep. 333; *Madden v. Brown*, 71 Me. 432; s. c., 36 Am. Rep. 336.

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(60 Wis. 533.)

Marriage — legitimacy — wife as witness — proof of husband's non-access.

A wife may not testify, on a question of the legitimacy of her children, to facts tending to show non-access of the husband.*

CONVICTION of bastardy. The opinion states the case.

S. & A. S. Ritchie, for plaintiff in error.

H. W. Chynoweth, assistant attorney-general, for defendant in error.

ORTON, J. This is a case of bastardy. The prosecutrix was a married woman, and the wife of one John Birket. The child was begotten in January, 1881, and born the following November, in the city of Racine. The marriage between her and John Birket took place in Galena, Illinois. It inferentially appears from the evidence that they lived together in the State of Iowa in 1879, and that she left him in that State and came from there to the city of Racine in 1880. On the trial the prosecutrix was asked by the prosecutor, "Who did you come from Iowa with?" and she answered, "I came alone." "Where was your husband when you came alone from Iowa?" and she answered, "I don't know where he was." "Have you ever had connection with any other man?" and she answered, "No, sir; I never did." These questions were all objected to at the time and the objection overruled, and the counsel of the defendant

* See *Melvin v. Melvin* (58 N. H. 609), 42 Am. Rep. 605.

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moved to strike them and the answers to them out of the evidence, and the motion was denied. Counsel of the defendant asked the court to instruct the jury as follows: "The wife is not a competent witness to prove that the husband did not have access to her, and you will therefore disregard all evidence given by the prosecutrix herself which tends to show that the husband could not have been the father of the child;" which instruction the court refused to give. After verdict the counsel of the defendant moved for a new trial, and urged these same objections again.

The law is well settled that the wife, on the question of the legitimacy of her children, is incompetent to give evidence of the non-access of her husband during the time in which they must have been begotten. This rule is founded on the very highest grounds of public policy, decency and morality. The presumption of the law is in such a case that the husband had access to the wife; and this presumption must be overcome by the clearest evidence that it was impossible for him, by reason of impotency or imbecility, or entire absence from the place where the wife was during such time, to have had access to the wife, or to be the father of the child. Testimony of the wife even tending to show such fact, or of any fact from which such non-access could be inferred, or of any collateral fact connected with this main fact is to be most scrupulously kept out of the case; and such non-access and illegitimacy must be clearly proved by other testimony. *King v. Inhabitants, etc.*, 5 Ad. & El. 180; *Dennison v. Page*, 20 Penn. St. 420; *People v. Overseers*, 15 Barb. 286; *Comm. v. Shepherd*, 6 Binn. 283; *State v. Pettaway*, 3 Hawks, 625; *Cope v. Cope*, 1 Moody & R. 269. The law is so well settled, and not being disputed by the attorney-general on the argument, no further citation of authority is necessary.

The only question is, Do these questions or answers conflict with this principle? Asking the prosecutrix "who came with her from Iowa," where she had lived with her husband, included her husband, and implied the inquiry whether he came with her; and the answer, "I came alone," established the fact that he did not come with her. The question, "Where was your husband at any particular time," whether during the time within which the child was begotten or not, was held in *King v. Inhabitants, etc., supra*, to be a collateral fact directly connected with the main fact, and objectionable. The second of the above questions comes directly within this decision. "Where was your husband when you came alone

from Iowa?" and her answer, "I don't know where he was," implied that they were estranged from each other, or that they had permanently separated; or at least, that they were not together or near each other. By the rule of evidence in ordinary cases such a condition of their relations as husband and wife would be presumed to have continued to that time, the contrary not being proved. The last of the above questions and the answer were positive and direct proof that the husband had had no access to her during the time in which the child must have been begotten. "Have you ever had connection with any other man?" "No, sir; I never did." This question was understood to refer to the time within which some other man might have begotten the child, and "any other man" embraced all men, including the husband, except the defendant. All these questions were very strongly objectionable, and the answer more so; and especially so in a case where to say the least, the testimony of the other witnesses as to such non-access was very weak and inconclusive. These witnesses did not know that the prosecutrix was married until the examination of this case before the magistrate; never knew or saw the husband at any time; and knew nothing of his personal appearance; and yet they testified that they had never seen him in Racine. This is the weakest kind of negative testimony, and it is quite apparent that the jury must have relied on the testimony of the prosecutrix herself almost solely for proof — conclusive proof — of the non-access. These were errors.

BY THE COURT. The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Reversed and remanded.

STATE V. STEWART.

(80 Wis. 587.)

Extradition — inter State — detention for another crime — Constitutional law — "crime" — crime near county boundary.

In the absence of compact between the States a fugitive extradited for one crime, may, after discharge and before he is allowed to return, be arrested and tried for another crime.
False pretenses is a "crime."

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A statute providing that offenses committed within one hundred rods of the dividing line between two counties may be prosecuted and punished in either, is not in violation of a constitutional provision securing to the accused the right to trial by a jury of the "county or district" wherein the offense was committed, and which county or district shall have previously been ascertained by law.

CERTIORARI. The opinion states the facts.

Stroud, Armstrong & Stroud, for relator.

H. H. Curtis, district-attorney, and *H. W. Chynoweth*, assistant attorney-general, for respondent.

CASSODAY, J. 1. It is claimed that the arrest for the last offense was illegal because it was made immediately after the relator had been tried, acquitted and discharged on the offense upon which he had been brought to the State from Indiana on the requisition of the governor, and before he had time to return.

Treaty stipulations between nations frequently guarantee to the fugitive the right to leave the demanding country after the trial for the offense for which the fugitive has been surrendered, in case of acquittal, or in case of conviction after his endurance of the punishment. When not so guaranteed it is sometimes made the subject of executive pledge. Whart. Conf. Laws, §§ 835, 844, 846. It has been held that an extradited fugitive cannot be held in violation of such treaty or pledge to answer for any other offense than the one for which he had been surrendered. *U. S. v. Watts*, 14 Fed. Rep. 130; *Comm. v. Hawes*, 13 Bush, 697; s. c., 26 Am. Rep. 242. But in the absence of such treaty stipulation it has been held that there is no implied obligation to delay the arrest for such other offense. *Adriance v. Lagrave*, 59 N. Y. 110; s. c., 17 Am. Rep. 317; *U. S. v. Caldwell*, 8 Blatchf. 131; *U. S. v. Lawrence*, 13 Blatchf. 295. So it has been held to be no ground for releasing a prisoner who had escaped from the State in Canada and been forcibly brought back to the State and there arrested without the assent of the authorities of Canada. *State v. Brewster*, 7 Vt. 118; *People v. Rowe*, 4 Park. Cr. R. 253; *Dows' case*, 18 Penn. St. 37.

Here no treaty stipulation to guarantee return is involved, and hence cases of international extradition arising under such treaties are not applicable. *Ham v. State*, 4 Tex. App. 645. This is a case

of inter-State extradition, and arises under the Constitution and laws of the United States. "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." Const. of U. S., art. IV, § 2 The act of Congress is of the same import and provides that a copy of an affidavit made before a magistrate of the State from whence the person so charged has fled, properly certified, shall be sufficient to authorize such demand, arrest and delivery. Chap. 198, R. S., Wis., and § 5278, R. S., U. S. The act however is wholly silent as to any delay in arresting the prisoner upon any different charge after he has been acquitted or after he has endured the punishment for the offense for which he was extradited. It contains no provision securing to the fugitive any right of return. This distinction between international and inter-State extradition seems to be very marked. True, the learned judge who wrote the opinion in *Cannon's* case, 47 Mich. 486, cited by counsel, said, "We do not perceive any ground for the distinction." But the difference between such treaty stipulations, and the Constitution and laws of the United States, was not even mentioned, and no authority was cited, nor argument advanced, to prove that there was none. On the contrary, the learned judge said: "We do not deem it necessary to refer at large to the decided cases which were cited on the hearing. They cannot be reconciled in principle—although very few of them would conflict with our views on so plain a case as the present." The learned judge and the court were evidently impressed with the features and circumstances of the arrest in that particular case which distinguished it from the cases there cited by counsel. It has frequently been held in effect however by courts of equal ability, that a fugitive from justice extradited under the Constitution and laws of the United States, on the charge of the commission of a specific crime, and discharged therefrom, can be held by the courts of the State to which he is surrendered, for another and entirely different crime. *In re Noyes*, 17 Alb. Law J. 407; *In re Miles*, 52 Vt. 609; *Ham v. State*, 4 Tex. App. 645; *Williams v. Bacon*, 10 Wend. 636; *Browning v. Abrams*, 51 How. Pr. 172; *Dow's case*, 18 Penn. St. 37.

The inter-State extradition clause of the Constitution was never

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intended for the benefit of fugitives, nor to enable them to escape just punishment for their offenses. On the contrary, it was to secure the apprehension of any who should escape the jurisdiction wherein his offense had been committed. It was in effect a compact between the States upon a subject purely local, and as to which each would otherwise have been an independent sovereignty, that in case any person charged with crime in one State fled into another, such other should, on demand of the executive of the former, cause him to be arrested and secured, if found therein, and delivered up to the agent of the former to be removed to the State from which he so fled. It was in effect, a pledge from every State to each of the others, incorporated into the organic law of the nation, that it would become, to a certain extent, an agency in the administration of the laws of every other State against treason, felony, or other crime, as to all such criminals as should come within its borders. By it each State agreed not to willingly become a refuge for the criminals of any other, and not to allow any guilty person to go unpunished by its aid or connivance. This duty each State voluntarily assumed. The crime being committed, the offense properly charged, and the demand being properly made, the act of Congress referred to says "it shall be the duty of the executive authority of the State" to cause the fugitive to be arrested and secured, and to be delivered to the agent of the State from which he fled. "The performance of this duty however," said TANEY, C. J., "is left to depend on the fidelity of the State executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

* * * But if the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him." *Kentucky v. Dennison*, 24 How. 109. To the same effect, *Taylor v. Taintor*, 16 Wall. 370; *Ex parte Virginia*, 100 U. S. 347, 359; *Ex parte Siebold*, 100 U. S. 391. "But if he act," said Mr. Justice SWAYNE in *Taylor v. Taintor*, *supra*, "and the fugitive is surrendered, the State whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once, *ipso facto*, lose their binding effect."

Thus it appears that the State demanding and the State delivering

are each under a reciprocal duty to the other, the performance of which depends upon their respective fidelity to the mutual obligations resting upon them. But the State of Indiana is not here complaining of any violation of duty, nor that any of its sovereign rights have been outraged. It is the fugitive who makes complaint, and in the name of Indiana asks that he may be restored to that State from which he was extradited. He does this under an agreement or compact between the two States, not made to secure his escape from punishment, but to insure his trial, notwithstanding he has fled the State, in case he is charged with a crime. Here the relator was extradited because he was so charged. For that offense he was tried, acquitted and discharged. The record discloses no executive pledge guarantying his return. After his discharge he was arrested for obtaining property under false pretenses. He now asks to be discharged because he was not allowed time to return to Indiana before being arrested for the second offense.

In *Cannon's* case, 47 Mich. 486, the prisoner was taken from Kansas to Michigan, on a requisition of the governor of the latter State, on the criminal charge of seduction committed in that State. On being thus brought into Michigan he was taken before a justice of the peace, December 12, 1881, on the warrant for the seduction, for examination. The hearing was adjourned for cause to December 27, 1881. Before the hearing and while the prisoner was out on bail, to-wit: December 16, 1881, the prosecuting attorney commenced bastardy proceedings for the same transaction involved in the previous complaint for seduction, and thereupon a warrant was issued and he was arrested December 17, 1881. To that charge he refused to plead. December 27, 1881, he was brought before the magistrate on the charge of seduction, which was at once discontinued on the admitted ground that it was not founded on any legal reasons. Thereupon the prisoner was released by the Supreme Court on *habeas corpus* from detention in the bastardy proceedings. The court held that he was in legal duress at the time of the arrest in the bastardy proceedings, and in that the case is distinguishable from the one before us. The court also held in effect that bastardy was not such an offense as would have authorized extradition. If that was so, it was a strong and additional reason for holding the arrest illegal. *U. S. v. Watts*, 14 Fed. Rep. 130. The court also intimated, if it did not hold, that the charge of seduction was resorted to without any legal ground therefor and in bad faith,

merely to get the prisoner within the State. *Williams v. Bacon*, 10 Wend. 636. Here there is no intimation of any bad faith.

Whether obtaining property under false pretenses is a "crime," within the meaning of that word as used in the Constitution and laws of the United States, is a question properly for consideration. It seems to be settled that the words "treason, felony or other crime," as there used, "embrace every act forbidden and made punishable by a law of the State. The word 'crime' of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called misdemeanors, as well as treason and felony.'" 24 How. 99; *People v. Donahue*, 84 N. Y. 438; *Morton v. Skinner*, 48 Ind. 123; *In re Voorhees*, 32 N. J. L. 141. This rule was adopted by the present chief justice in *In re Hooper*, 52 Wis. 701, 702, and is abundantly supported by the authorities there cited. The obtaining of property under false pretenses is clearly a crime in this State (R. S., § 4422), and being so, there can be no question but what it is a crime within the meaning of that word as used in the Constitution and laws of the United States.

It follows that the relator might have been again extradited had he been allowed to go to Indiana after being discharged on the first offense. This being so, there seems to be no practical reason for holding that the relator could not be legally arrested immediately upon his discharge from the first offense, instead of being allowed to escape the State and then brought back on requisition. Such an arrest in such a case was certainly not in violation of any law of the United States. It was not in conflict with an agreement between the States. It was no breach of any executive pledge. It was no interruption of any comity between the States. We must therefore hold that the arrest was not illegal by reason of any of the objections mentioned.

2. It is claimed that although the alleged misrepresentations were made in Columbia county, yet that the arrest was illegal because the property, when obtained, was twenty rods beyond the boundary line of that county. The statute provides that offenses committed within one hundred rods of the dividing line between two counties may be alleged in the information to have been committed in either of them, and may be prosecuted and punished in either county, and the court of either such county, whose process shall have been first served upon the defendant, shall have priority

of jurisdiction. R. S., 1849, chap. 141, § 7; R. S., 1858, chap. 172, § 7; R. S., § 4618. It is urged that this statute is in conflict with the provision of the Constitution which secures to the accused the right "to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law." § 7, art. 1. This provision was embodied in the same title of the Revised Statutes of 1849 as the above section. R. S., 1849, chap. 132, § 2. Assuming that the obtaining of the property was essential to the completion of the offense, yet it was in part at least committed in the county of Columbia. *Wilcox v. Nolze*, 34 Ohio St. 520. This being so, the constitutional question involved is very much like the one in *State v. Pauley*, 12 Wis. 537; where it was held that a statute was constitutional which provided that if any mortal wound be given in one county, by means whereof death ensue in another county, the offense may be prosecuted in either county. R. S., 1849, chap. 141, § 8; R. S., 1858, chap. 172, § 8; R. S., § 4619. Both of "these sections," said the late chief justice, "were framed by very intelligent gentlemen, some of them being distinguished members of the bar, in the same year in which the Constitution was adopted; and they are plainly founded on the clause of the Constitution in question." *In re El-dred*, 46 Wis. 549. Of course where the offense is partly committed in each county and wholly in neither, as where it is committed right upon the line between two counties, there must be jurisdiction somewhere, and at common law it seems to have been in either county. 2 Whart. Crim. Law (7th ed.) § 2141.

But assuming that the offense was committed at the place where the horse was obtained, and not where the representations were made, yet we are of the opinion that the courts of Columbia county had jurisdiction. These sections of the statute having been adopted in the same year as the Constitution, and the constitutional clause having been embodied in the same title with these sections by the revisers of the statutes of 1849 and the legislature which adopted them, show pretty clearly that the words "or district," as used in this clause of the Constitution, were intended by the framers of that instrument, and understood by all at the time to mean something different than the word "county" as therein used; especially when taken in connection with the words "which county or district shall have been previously ascertained by law." From this it

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appears to be competent for the legislature to change the boundaries of the districts without changing the boundaries of the counties. For as observed by RYAN, C. J., in the case above cited, "the words 'county' or 'district,' as used in the clause, must both be held to have a meaning and a use." 46 Wis. 548. Giving to each such distinct meaning and use, there seems to be no difficulty in holding that each criminal district, as ascertained by the laws now in force, extends one hundred rods beyond the boundaries of each county.

Whether a jurymen residing outside of the county, but within one hundred rods of the county line, and hence within the district, would for that reason be incompetent, or a subject of peremptory challenge, is a question not here presented. "This very peculiar language" of the Constitution, said the late chief justice, "is obviously designed to avoid the difficulties which had arisen at common law, without depriving the accused of trial by a jury of the vicinage." 46 Wis. 548. Of course no one would insist upon a construction which would require every jurymen in every criminal case to be a resident of the very place where the crime was committed. On the contrary most of them must necessarily reside quite remotely from such place. The constitutional right secured is that they shall all be taken from "the county or district wherein the offense shall have been committed." This constitutional provision does not undertake to define or limit the jurisdiction of the courts over criminal offenses, but simply defines and limits the locality from which a jury must be taken for the trial of such offenses, and secures to him the right of a trial within the same limits. This has been substantially held in Minnesota. *State v. Robinson*, 14 Minn. 453. See also *Wheeler v. State*, 24 Wis. 52. In Tennessee, the words "or district," in a similar constitutional provision, were treated, in view of their prior use, as a mere superfluity. *Armstrong v. State*, 1 Cold. 338. But for the same reason we feel bound to give them significance. If the clause in question was intended to absolutely define and limit criminal jurisdiction, then there could be no change of venue even on behalf of the prisoner. It is the "right" of the "accused" that the constitutional clause in question is dealing with, and not the jurisdiction of the courts. It is found in the article on the "Declaration of Rights," and not in the article on "Judiciary." No clause of this last article, or any other, has been pointed out which seems to limit such

criminal jurisdiction to the precise boundaries of the county, and we find none. On the contrary, the Constitution in another article speaks of "each county of this State organized for judicial purposes" (§ 11, art. VII), clearly indicating that a county may be organized as a county, and yet not organized as such for judicial purposes. Accordingly there are several counties in the State organized for county purposes only, and yet each is attached to some other county for judicial purposes. The Constitution seems to leave such criminal jurisdiction almost wholly to be regulated by statute.

We must therefore hold that the arrest was not illegal by reason of the property being obtained twenty rods outside of the boundaries of Columbia county; and that notwithstanding that fact, the courts of that county under the statute referred to had jurisdiction to prosecute and punish the offense of which the accused is charged.

[Minor points omitted.]

BY THE COURT. The order remanding the prisoner is affirmed.

Order affirmed.

CASES
IN THE
SUPREME COURT AND COURT
OF ERRORS AND APPEALS.
OF
NEW JERSEY.

VAN HOUTEN v. STATE.

(48 N. J. Law, 16.)

Criminal law — indecent exposure.

It is not essential to the crime of indecent exposure that anybody should have seen the exposure, provided it were intentionally made, in a public place, and persons were present who could have seen if they had looked.

CONVICTION of indecent exposure. The opinion states the case.

Edward M. Colia, for plaintiff in error.

Oscar Keen, prosecutor of the pleas, for State.

BRASLEY, C. J. This was an indictment charging the defendant with indecent exposure. The criminal act alleged was that the defendant, in urinating, intentionally exposed his nakedness in a public place. The transaction in question occurred in the yard of a house which was occupied in part by the defendant and in part by the prosecutors. The defendant himself, when on the stand as

a witness, admitted that if he had done the act in the places designated by the prosecutors in their testimony, he would have exposed himself to the windows of two dwelling-houses that were then inhabited and were close to the *locus in quo*. The defendant, at the trial, in his own testimony, denied that he occupied the position in question, and asserted that at the time of the occurrence he had betaken himself to a place retired from observation.

If the State's account of this affair was the truth, there can be no doubt that in a legal sense the act complained of was done in a public place. Accepting that version as the true one, the defendant exposed himself so that he could be seen from the windows of two dwelling-houses that were within a few feet of the place of the occurrence. It were the law that a man could lewdly expose his naked person to the inmates of two dwelling-houses, as was said in the case of *Reg. v. Holmes*, 6 Cox C. C. 216, "this would not be a country fit to live in if such an abominable outrage could go unpunished."

According to the law of this offense the place is a public one if the exposure is such that it is likely to be seen by a number of casual observers. In the case of *Reg. v. Farrell*, 9 Cox C. C. 446, which is an authority relied upon by the defense in the present instance, it was declared that by an indecent exposure in a place not far from a highway, the common law offense had not been committed, but the court was careful to supplement his decision with the remark "that it is not to be taken that we lay down that if the prisoner was seen by one person, but there was evidence that others might have witnessed the offense at the time, we would not uphold the conviction."

On the facts of the case, if the jury took them as stated by the witnesses for the prosecution, the place of the alleged offense was a public place, and if the judge had so told the jury his charge in that respect would have been legal and would have comprised all that he could be required to say on the subject. The same testimony proved that when in that position he was seen by them to make an indecent exposure of his person. Upon this subject the trial judge charged in these words "I think the true principle is, and I so instruct you, that as a general proposition the place where the exposure is made should be public; but that it is sufficient if the place is not ordinarily public, but only so in consequence of persons being temporarily assembled there, and further that there is no need that the

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exposure should be actually seen by any one, provided that it was made to be seen, and those who were there could have seen it if they had looked, and if so made, the place being public, it is immaterial whether the exposure was made to one person or to many."

In my opinion this extract from the charge contains a proper expression of the law on this general subject, but that part of it which consists of the declaration that the delinquent need not be seen by any one, was not germane to the case, for both witnesses on the part of the State had unequivocally testified that they had seen the indecent exposure in question. This was no essential part of their statement, and it is not within the range of possibility that the jury could have convicted the defendant on their testimony of the offense charged, and at the same time rejected their averment that they saw it. Consequently if the charge was faulty in holding that the defendant was guilty, although no one actually saw the indecent exposure made by him, an exception on that point could not avail in this writ of error, as such misstatement of the law could not have prejudiced the defendant on the trial of the merits of the case. But as I have said, I do not think that even with respect to legal theory, there was any fallacy in the charge in this particular.

The jury were further instructed on the subject of criminal purpose in the following language: "I instruct you that the testimony must show that the exposure was not merely accidental, and in order to convict the defendant you ought to be satisfied, from the testimony, that the exposure was intentional, at such time and place, and such manner as to offend against public decency; but intent may be inferred from recklessness. It is not necessary that some witness should testify that the defendant had said that he intended to commit the act; you can infer what he intended to do from what he actually did do."

This also was a correct statement of the law on this branch of the case, and taken in connection with the previous instruction above referred to, was all that could be properly required. The defense indeed requested that the court should charge the jury with respect to eighteen legal propositions which were submitted in writing, but the whole of them were properly rejected, as all the law appertaining to the matters in issue had been, with entire clearness and correctness, already expounded.

The judgment should be affirmed.

Judgment affirmed.

WESTERVELT v. DEMAREST.

(46 N. J. Law, 37.)

Fraud — corporation — publication by bank directors.

The publication by savings bank directors, that directors and stockholders are personally responsible for its debts, does not constitute a contract with depositors, but if intentionally false, affords the basis of an action for deceit.

THE opinion states the case. The plaintiff had judgment below.

Bedle, Muirheid & McGee, for plaintiff.

Charles H. Voorhis and *W. M. Johnson*, for defendant.

VAN SYCKEL, J. This cause was tried before the Bergen county Circuit Court by consent without a jury. The trial judge found the facts to be as hereafter stated. The defendants, directors of the Hackensack Savings Bank, authorized the publication in a Bergen county newspaper, from April 29, 1873, to May 1, 1874, of the following advertisement :

“ Hackensack Savings Bank.

“ Directors and Stockholders Personally Responsible.

“ Directors :

“ Issac D. Demarest,

Charles H. Voorhis,

“ John H. Banta,

Abraham Collerd,

“ Edward A. Walton,

Henry H. Voorhis,

“ Garrett A. Lydecker.

“ C. H. Voorhis, *President* and *Treasurer*.

“ Isaac D. Demarest, } *Vice-Presidents.*
“ John H. Banta, }

“ A. D. Brower, *Secretary*.

“ Open daily, at the First National Bank, from 10 A. M. to 3 P. M. and on Saturday evenings from 6 to 8 o'clock.

“ Money deposited on the first business day of the month will bear interest from the first day of the month.

“ Money deposited after the first business day of the month will bear interest from the first day of the next month. Interest 6 per cent on all sums.”

* See *Cowley v. Smyth*, post.

The plaintiff saw this advertisement in the newspaper and because of it became a depositor in said bank.

He made his first deposit on the 26th of February, 1874, and various deposits thereafter.

On the pass-book given to him by the bank, in which his deposits were entered by the bank officers, there was the following printed statement: "The directors and stockholders are personally responsible for all debts and engagements of the bank."

In November, 1879, the bank became insolvent and passed into the control of the chancellor.

The plaintiff brought this suit against the directors in 1882 to recover the amount he had deposited in the bank.

The right of action is based upon the allegation that the defendants agreed, in consideration of the deposit being made in the bank, that they would be personally responsible therefor and pay the same upon demand.

Such an agreement to answer for the debt or default of another is within the statute of frauds, and to give it the character of a legal obligation a note or memorandum thereof in writing, signed by the defendants, is requisite.

The plaintiff insists that a contract on the part of the defendants to pay him arises out of the publication by them of the advertisement in the newspaper and the entry of the same statement in the pass-book.

There is nothing in the rules of the bank which declares that the directors or stockholders shall be personally responsible for its debts. If a contract exists it must be found in the statement authorized by the defendants, that the "directors and stockholders were personally responsible."

A contract is an agreement *inter partes*, for sufficient consideration, to do or not to do a particular act. It is manifest that the essential features of a contract are not present here. The publication was a mere representation that a certain fact existed, which cannot, in legal contemplation, be viewed as an agreement, without utterly disregarding the distinction between an *ex parte* statement and a contract. If the published statement had been that stockholders alone were personally responsible, the idea that thereby a contract arose on the part of the directors that the stockholders were personally liable would not even have been suggested. The fact that the advertisement included the directors in the asserted

liability cannot transform a mere representation into a bargain. The language used contains no undertaking that the directors will pay future depositors. It does not purport to create any liability whatever, or to enter into any engagement, but asserts that a liability already existed. It is not in the form of a present undertaking or agreement to pay. If a contract it embraces in its terms both directors and stockholders. No authority appears to charge the latter with such an obligation; the language used is inapt and insufficient for that purpose and could not have been so intended or understood.

It is clear that no contract was entered into between these parties and that no recovery can be had on the ground of a contract liability. But the statement that directors and stockholders were responsible for all debts and engagements of the bank was false, to the knowledge of defendants, and therefore fraudulent. It appearing, as one of the findings of fact in the case, that the plaintiff made his deposits relying upon the truth of this statement, he would be entitled to recover the loss he sustained by acting upon it, in an action for deceit. It also appears from the pass-book that entries to the credit of the plaintiff were made in it by the bank officers on the 1st day of May and 1st day of November, in each year from 1873 to 1879, inclusive. The return of this pass-book to the plaintiff on each of these occasions, with the aforesaid printed statement upon it, was a reiteration of the false representation, and it is manifest that thereby the plaintiff was induced to permit his deposits to remain and accumulate in the bank.

This deceit having been practiced by the defendants within six years they could not avail themselves of the statute of limitations as a defense. Although recovery in this case cannot be maintained upon the basis of a contract, it is obvious that the granting of a new trial would be of no avail to the defendants, for the pleadings would be amended by the trial court, and upon the incontrovertible facts a verdict must necessarily pass in favor of the plaintiff for the loss the false representation has occasioned. •

That loss was the sum deposited with interest, being the same amount for which the verdict has been found in this case. The plaintiff being clearly entitled to recover the sum found, the necessary amendment may be made.

The rule to show cause should be discharged.

Judgment accordingly.

Nolan v. Manton.

NOLAN V. MANTON.

(46 N. J. Law. 231.)

Contract — implied — priority.

Where a savings bank paid to a widow a deposit made by her husband in his own name upon her claim that it was her property, the administrator of the husband cannot recover it from her.

ACTION for money received. The opinion states the case. The plaintiff had judgment below.

E. Cutter and A. V. Schenck, for plaintiff in error.

J. W. Beekman, contra.

DEPUE, J. John Manton died January 6, 1877, leaving a widow and several children surviving. At the time of his death there was to his credit in the Emigrant Industrial Savings Bank, in New York city, the sum of \$1,007.43. The bank-book, which was the evidence of the deposit, was in his name alone. In January, 1878, the sum so deposited, with interest, amounted to \$1,063.67.

After his death, his widow, without letters of administration, received this money from the bank in several sums, between January 27, 1878, and March 6, 1879. She intermarried with one Nolan in September, 1882. In May, 1883, the plaintiff, a son of the deceased, took out letters of administration on the estate of his father, and then brought this suit against Mrs. Nolan to recover of her the money. The action is in assumpsit for money had and received.

The evidence on the part of the plaintiff tended to show that the defendant obtained the money with the understanding that she was to hold it until an administrator should be appointed, and then account for it. On this presentation of the case, the defendant received the money on an express trust — upon an undertaking to pay it to an administrator when one should be appointed. This trust inured to the benefit of the administrator when letters of administration were taken out, and thereupon a contract to pay him was implied. Com. Dig., "Action on the Case," E; 2 Greenl. Ev., § 119. The motion to nonsuit was therefore properly denied, and the exception on that ground is not sustained.

The defendant, as part of her case, denied that she received this money on any such trust, or upon any trust whatever. She contended, and so testified, that the moneys deposited in the bank from time to time, and making up the account, were her moneys which she had earned, and that they were in fact deposited in the bank in the names of her husband and herself; that she did not discover that the bank-book was in her husband's name alone until after his death; that she demanded the money of the bank as money belonging to her, and that the officers of the bank, being satisfied that she was the "right owner," paid the money to her as such.

On this evidence the defendant's counsel asked the judge to charge that the payment to the defendant by the bank, and the receipt by the defendant of the money on a claim by the defendant that the said money was her money, would not raise an implied promise in law, on the part of the defendant, to pay the money to the plaintiff, and consequently that the action could not be maintained in the absence of proof of an express promise by the defendant to pay the same. The judge refused the request, and charged that if the defendant took the money from the bank when it was not hers, there was an implied assumption that she would return it when requested, whereupon the defendant took an exception.

The only question presented by this exception is whether, by the law of this State, an action for money had and received will lie where the defendant has not received the money in suit on a contract, express or implied, to hold it for the use of the plaintiff; in other words, whether privity of contract, express or implied, is not necessary to give a plaintiff a standing in court to maintain the action.

The leading case in the English courts on this branch of the law is *Williams v. Everett*, 14 East, 582. The facts in that case were these: One Kelly, residing abroad, was indebted to several persons in England. Among his creditors was the plaintiff, Williams. Kelly remitted bills to the defendants, his bankers, in London, with directions to pay the amount in certain specified proportions to the plaintiff and other of his creditors. Williams had also received a letter from Kelly, ordering payment of his debt out of that remittance. Williams showed the letter to the defendants, and offered an indemnity if they would hand over one of the bills to him. The defendants refused to indorse the bill or to act upon the letter, and afterward received the money on the bills. Williams then brought his action against the defendants for money had and

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received to his use. At the trial he was nonsuited on the ground, that the defendants having renounced the terms on which the bills were remitted before the money was actually received, it was only money had and received to the use of the remitter of the bills. The nonsuit was sustained *in banc* for the reason that there was no assent on the part of the defendants to hold the money for the purposes mentioned in the letter, and that in order to constitute a privity between the plaintiff and defendants, an assent, express or implied, to receive the money for the plaintiff was necessary.

Vaughan v. Matthews, 13 Q. B. 187, is another precedent to the same effect. The plaintiff was administrator of Jane Vaughan, who died in March, 1843. The defendant was executor of Ann Vaughan who died in March, 1844. Jane had lent to one Evans £150, and received from him, as security, his promissory note, payable, as was said by the plaintiff, to Miss Vaughan. After the death of Ann, the defendant, as her executor, brought suit against Evans on the note, alleging it to be payable to Miss Vaughans, and not to Miss Vaughan only, and as Ann survived her sister, she would have the right to enforce payment. Evans settled the action and paid the amount to the defendant. The plaintiff alleged that the letter "s" had been fraudulently added to "Vaughan," and that the defendant had wrongfully received payment from Evans of the promissory note, which really belonged to the plaintiff as administrator of Jane, the payee, who had furnished the consideration. For the defendant it was contended, that admitting the whole of the plaintiff's case as it was stated by him, an action for money had and received could not be maintained. The court directed a nonsuit to be entered. Lord DENMAN, C. J., delivering the opinion of the court, said: "The defendant received the money in his own right, in payment of a note, which if genuine, would have been his property as executor of Ann Vaughan. The payment was not in respect of a note to which, if genuine, 'the plaintiff would be entitled; nor can the defendant be considered as acting in any respect as his agent. The facts stated do not raise the legal inference that the money paid by Evans was had and received by the defendant to the use of the plaintiff. Evans may still be liable to the plaintiff for the money lent to him by Jane Vaughan, if not upon the note, and the defendant may be liable to refund to Evans the money paid by the latter under mistake or misrepresentation; but there is no contract, express or implied, between the plaintiff and the defendant."

There is also a series of decisions in the courts of New York of like import, which hold that where two claimants for the same money apply for payment to the party from whom it is due, and one of them is recognized as being entitled to it and is paid, to the exclusion of the other, who is in fact the one entitled to it, the latter cannot sue the former to recover the money of him, for the reason that the party receiving the money, having received it under a claim of right in himself, the law will not imply any contract or promise by him to hold the money for the use of the other, or to pay it over to him, and that therefore there is not under such circumstances any privity of contract on which to found the action. *Patrick v. Metcalf*, 37 N. Y. 332; *Butterworth v. Gould*, 41 N. Y. 450; *Rowe v. Bank of Auburn*, 51 N. Y. 674; *Hathaway v. Town of Homer*, 54 N. Y. 655; *Decker v. Saltzman*, 59 N. Y. 275.

There are decisions in the courts of some of our sister States giving to the action of assumpsit, as an equitable action, a broader scope, and holding that to warrant the action there need be no privity of contract except that which results from one man having another's money, which he has not a right to retain *in foro conscientia*, and which he ought, *ex æquo et bono*, to pay over. But if we were disposed to advance the action up to those limits, we would be restrained by a precedent in this court, which is binding upon us. I refer to the case of *Sergeant v. Stryker*, 1 Harr. 464. The facts in that case were these: The sheriff of H. had offered a reward for the apprehension of a prisoner who had escaped from jail. Stryker arrested the prisoner and lodged him in jail. Sergeant and Harris, falsely representing to the sheriff that they had arrested the prisoner and were entitled to the reward, received it of the sheriff. Stryker then sued Sergeant and Harris for the money so received by them of the sheriff, as money received to his use. This court held that the action would not lie. The ground was that there was not between the parties any privity, express or implied, whereon to found the action. Chief Justice HORNBLOWER, in delivering the opinion of the court, cited *Williams v. Everett*, *supra*, with approval, as a case decided upon great consideration. He re-affirmed the doctrine of that case, that privity of contract was necessary to the action, and that could arise only from the receipt of the money under an assent, express or implied, to hold it for the benefit of the plaintiff. That assent, he said, could not be implied in that case; "for the defendants instead of receiving the money as the money of the

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plaintiff or for his use, claimed and received it as their own, and wholly deny the plaintiffs right to it." I cannot distinguish the case just cited from the case presented by this exception. There was, at the trial, evidence both ways, and we cannot on this bill of exceptions, consider on which side the evidence preponderated. The defendant was entitled to the instruction that the action was not maintainable if in the judgment of the jury, the money was received by her as her own money, under a claim of right to it and without any assent to hold it for the benefit of the estate, or the administrator, when an administrator should be appointed.

It was also insisted that this action was maintainable against the defendant as an executrix *de son tort*. But it will be observed that this suit is not on an action by a creditor to recover of the defendant as executrix in virtue of assets of the deceased in her hands, nor is she sued as executrix *de son tort*. The gravamen of the action is money had and received to and for the use of the plaintiff as administrator of the deceased, and the question presented by the record is whether the money was so received as to create, as between defendant and the plaintiff, that privity which is an essential element of such an action.

For the reason above given, the judgment should be reversed.

Judgment reversed.

PARKER V. BUTTERWORTH.

(46 N. J. Law, 244.)

Statute of limitations — joint promisors — new promise — payment.

A joint promisor wrote the promisee that it would be impossible for him to pay the note at present, and asked indulgence until he or the other maker or both should be in better condition to liquidate it. *Held*, a conditional promise to pay when able, not available to the promisee without affirmative proof of the fulfillment of the condition *

A payment by one joint promisor will not remove the completed bar of the statute of limitations as to another. †

* To same effect, *Richardson v. Brucker* (7 Colo. 53), 49 Am. Rep. 844, and note, 348.

† See *Miller v. Miller* (MacA. & Mack. 109), 48 Am. Rep. 788.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

James N. Stratton and Charles Haight, for the rule.

James Steen, contra.

DEPUE, J. This suit was brought upon a joint and several promissory note made by John H. Woodward and William L. Butterworth, bearing date June 17, 1867, for the sum of \$1,241.46, payable to Deborah Parker and Leah Parker, or the survivor of them in one year after date. Deborah died in 1874. The suit was in the name of Leah, the survivor, as plaintiff, and Woodward being out of the jurisdiction of the court, Butterworth alone was made defendant. The action was begun by a summons returnable April 3, 1883. The defense was the statute of limitations. To meet this defense the plaintiff relied (1) on an acknowledgment or promise to pay, contained in a letter written to her by Butterworth the defendant, bearing date September 1, 1877, and (2) upon a payment of \$100 on the note made June 1, 1882, by Woodward, the other joint maker.

By the limitation act, as contained in the revision, which went into effect January 1, 1875, it is provided with respect to actions on simple contracts, first, that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of this act, or to deprive any person of the benefit thereof, unless such acknowledgment or promise shall be made or continued by or in some writing to be signed by the party chargeable thereby;" second, "that where there shall be two or more joint contractors or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of this act so as to be chargeable in respect or by reason only of any written acknowledgment or promise, and signed by any other or others of them;" third, "that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever;" fourth, "that in actions to be commenced against two or more such joint contractors or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by this act as to one or more of such joint con-

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tractors or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise or otherwise, judgment may be given and with costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff;” fifth, “that no indorsement or memorandum of any payment, written or made after this act shall go into effect, upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of this act.” Rev., p. 595, 596, §§ 10, 11.

These sections are in substance the same as sections 1 and 3 of 9 Geo. IV, chap. 14. The only change that they made in the law is with respect to the rules of evidence. Before this statute an acknowledgment or promise to pay, or a payment on account, under some circumstances, would take a case out of the statute of limitations. The new statute simply required that the acknowledgment or promise to have that effect should be in writing and signed by the party to be charged thereby. It made no alteration in the legal construction or effect of an acknowledgment or promise when proved in the manner prescribed by the statute, and the question whether the document written and signed “amounts to an acknowledgment or promise is no other inquiry than whether the same words, if proved, before the statute was enacted, to have been spoken by the defendant, would have had a similar operation and effect.” *Haydon v. Williams*, 7 Bing. 163; *Edwards v. Culley*, 4 H. & N. 378; *Dickenson v. Halford*, 5 C. & P. 46; Wood Limitations, § 84. The statute has made no change in the law with respect to payment on account, except that the indorsement or memorandum of the payment upon any promissory note, bill of exchange or other writing, written or made after the act went into effect, by the party to whom payment is made, shall not be sufficient proof thereof. Payment as a fact must be proved by evidence *aliunde*. It may be proved by any kind of evidence, written or oral, which otherwise would be competent as proof of a matter of fact in issue; and any payment which would have been sufficient before this statute was passed is still sufficient to remove the bar of the statute of limitations. *Merritt v. Day*, 38 N. J. L. 32; s. c., 20 Am. Rep. 362; *Cleave v. Jones*, 6 Exch. 573, 578; *Bevan v. Gething*, 3 Q. B. 740; *Bradley v. James*, 13 C. B.

822; *First National Bank v. Ballou*, 49 N. Y. 155; *Wood Limitations*, § 96.

The statute has the words "acknowledgment or promise" as the evidence of a new and continuing contract. The use of these words in the disjunctive in the statement of the law gave rise to a series of opposing authorities, in some of which it was held that the statute of limitations was founded on a mere presumption of payment, and that whatever repelled that presumption was an answer to the statute and that therefore an acknowledgment of the non-payment of a debt, though accompanied by a conditional promise, or even a refusal to pay, was a sufficient answer to the statute. These cases were overruled by the Court of King's Bench before the act of 9 Geo. IV. was passed, in *Tanner v. Smart*, 6 B. & C. 603, a case which Baron PARKE said put an end to a series of decisions which were a disgrace to the law. *Hart v. Pendegrast*, 14 M. & W. 741. Since the decision in *Tanner v. Smart* the law in the English courts has been settled on this footing — that from a bare unqualified acknowledgment of a subsisting debt the law will imply a promise to pay which will obviate the bar of the statute, but that if there be in the admission, or on the face of the writing containing such an acknowledgment, any thing to repel the inference of a promise to pay, the rule *expressum facit cessare tacitum* applies; no promise will be implied and the acknowledgment will not enable the plaintiff to recover. And if the acknowledgment be coupled with a promise which is qualified or conditional, neither the acknowledgment nor the promise will be available unless the condition has been performed or the event happened by which the promise is qualified. *Smith v. Thorn*, 18 Q. B. 134, 143; *Hart v. Pendegrast*, 14 M. & W. 741, 744; *Sidwell v. Mason*, 2 H. & N. 306, 309, 310; *Everitt v. Robertson*, 1 El. & B. 13-19; *In re River Steamer Co.*, L. R. 6 Ch App., 822-828; *Street v. Lindsay*, 2 Exch. Div. 314-316; *Wood Limitations*, § 85. The weight of authority in the courts of this country is in accordance with the English doctrine, as will appear in the note of the American editors to *Whitcomb v. Whiting*, 1 Sm. Lead. Cas. 867; and such has been the course of decisions in this State. *Belles v. Belles*, 7 Hal. 339; *Ridgway v. English*, 2 Zab. 409, 413, 419; *Ex'rs of Conover v. Conover*, 1 Saxt. 403.

The defendant's letter of September 1, 1877, relied on as an acknowledgment or promise, was written in answer to a letter of

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the plaintiff, which was not produced in evidence. No part of the defendant's letter, except the paragraph which will be quoted, contains any thing which would be construed to be an acknowledgment or promise. That paragraph is in these words: "It would be impossible for me to pay the note at this time; therefore I shall be a thousand times obliged to thee if thee will allow it to rest until John or I, or both, are in better condition to liquidate it." It is clear that there is not in these words an unqualified promise to pay immediately or on request. The preceding paragraphs of the letter identify the note sued on as that to which the correspondence related, and contain an admission by the defendant that he signed the note as surety for Woodward. Taken in connection with the defendant's admission that he signed the note and his declaration of his present inability to pay, I think the words quoted are sufficient to warrant the implication of a qualified promise by the defendant to pay when his circumstances had so improved that he had the ability to pay. To make such a promise available the plaintiff was bound to furnish affirmative proof of the substantial fulfillment of the condition (*Tanner v. Smart*, *Hayden v. Williams*, *supra*; *Scales v. Jacob*, 3 Bing. 638; *Ayton v. Boll*, 4 Bing. 105; *Edmunds v. Downs*, 2 C. & M. 459; *Meyerhoff v. Froehlich*, 4 C. P. Div. 63; *Tompkins v. Brown*, 1 Denio, 247; Wood Limitations, § 77); and of that there was no evidence. The verdict cannot be sustained on the new promise of the defendant.

To take the case out of the statute of limitations by a payment on account, the plaintiff relied on a payment made by Woodward, one of the joint makers of the note. Woodward sent a draft to the plaintiff for \$100 in a letter directed to her, dated Durango, California, May 9, 1882. The plaintiff received the money on the draft, and June 1, 1882, credited on the note. The letter remitting the draft gave no directions as to the appropriation of the money. The only reference to the subject is in these words: "Enclosed is a draft for \$100. It strained me to raise it, but I thought thee needed it." There was some evidence that there was another indebtedness on the part of Woodward to the plaintiff besides the note in suit. The judge left the question to the jury whether the payment was made on account of this note, under proper instructions, and I think there was sufficient evidence to justify the jury in finding that the payment was made thereon.

Woodward removed from this State shortly after the note was

given. He resided in California when the suit was brought. Although the fact does not appear distinctly by the evidence, it is probable that his continued residence out of this State avoided the bar of the statute of limitations as against him. Butterworth resided in this State, and the statute was a bar to any action against him on the note at the time this payment was made. The problem presented by these facts is whether a payment on account by one joint promisor will remove the bar of the statute of limitations as against a copromisor in whose favor the statute had attached when the payment was made.

The leading case on this subject is, of course, *Whitcomb v. Whiting*, 2 Doug. 652. In that case the declaration was in form on a promissory note executed by the defendant. Pleas, *non assumpsit* and *non assumpsit infra sex annos*. The plaintiff produced a joint and several note executed by the defendant and three others, and having proved payment by one of the others of interest on the note, and part of the principal within six years, and the judge thinking that was sufficient to take the case out of the statute as against the defendant, a verdict was found for the plaintiff. On rule to show cause before Lord MANSFIELD, Chief Justice and WILLES, ASHURST and BULLER, Justices, the verdict was sustained. Lord MANSFIELD said: "Payment by one is payment by all, the one acting virtually as agent for the rest, and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due." WILLES, Justice, said, "The defendant has had the advantage of the partial payment, and therefore must be bound by it." ASHURST and BULLER, Justices, were of the same opinion.

Whitcomb v. Whiting, though not always approved, has been so frequently declared to be the law in this State that its force as authority cannot now be disputed. I have quoted the case almost at length with a view of an inquiry as to what the case decided. It will be observed that it does not appear in the report of the case that the note in suit was affected by the statute of limitations at the time the payment was made. Indeed it appears inferentially to have been otherwise, for no such point was made by counsel, and it is improbable that an available argument of so much plausibility, if not weight, should have been overlooked by counsel or passed by the court without comment. Lord MANSFIELD's reasoning that "payment by one is payment by all, the one acting virtually as

agent for the rest," could apply only to a payment made in the interest of all, and the observation of WILLES, Justice, that "the defendant had had the advantage of the partial payment, and therefore must be bound by it," would be wholly inapplicable if the defendant had been entirely released from his liability on the note by the statute when his co-promisor made the payment. The report of this case affords no warrant for the assumption that it decided that a payment within six years before suit, by one promisor, would take a case out of the statute as against a co-promisor, where the payment was made after the statute had effected a discharge of the latter from the joint obligation. The other leading English cases on the subject are *Burleigh v. Stott's Admr's*, 8 B. & C. 36, and *Perham v. Raynal*, 2 Bing. 306, more fully reported in 9 Moore 566. In *Burleigh v. Stott's Admr's*, the suit was against the administrator of Stott, one of the makers of a joint and several promissory note. The note was dated March 4, 1818, and payable to Robert Burleigh, the plaintiff, on demand. Stott died March 3, 1821. The suit was brought October 3, 1826. It appeared that Thomas Burleigh, the other maker, and who was the principal debtor, on the 10th of October, 1818, paid the interest on the note to that day and on the 10th of October, 1820, the interest then due and a sum on account of the principal, without the knowledge of Stott. These payments were made by Burleigh whilst the joint liability of himself and Stott subsisted; and as was said by HOLROYD, J., Stott had the benefit of the part payment, and he ought to bear the burden. The court, following *Whitcomb v. Whiting*, gave judgment for the plaintiff. In *Perham v. Raynal*, one of the defendants was surety on a joint and several note, and within six years before suit a co-defendant, who was the principal debtor, had acknowledged the debt to be due. It does not appear in either report of the case whether the acknowledgment was before or after the bar of the statute. The questions discussed and decided were whether *Whitcomb v. Whiting* was law, and whether an acknowledgment by the principal debtor could affect a surety.

The only cases in the English courts which directly decide that payment by one co-promisor after the bar of the statute had attached would deprive the other promisor of the benefit of the statute are *Channell v. Ditchburn*, 5 M. & W. 494, and *Goddard v. Ingram*, 3 Q. B. 839. In *Channell v. Ditchburn*, the suit was against the makers of a joint and several promissory note. The proof was of the

payment of interest by one of the makers within six years from the commencement of the suit, but more than six years after the note became due. The debt had been once barred by the statute, and the court held that it was revived against both the makers by the payment of interest by one. The case was decided on the assumption that *Whitcomb v. Whiting* was a parallel case, and on the authority of *Manderston v. Robertson*, 4 Man. & Ry. 440. On looking at the report of *Manderston v. Robertson*, it will be found that that point was not adverted to. In *Goddard v. Ingram*, the suit was against surviving partners to recover the balance of a debt due on partnership account, on which one of the partners had made a small payment after the whole amount was barred. The payment was made after the dissolution of the partnership, and when the partner making it was "in the jaws of bankruptcy," and the jury found that the payment was made by him in concert with the plaintiffs, in fraud of his copartners. This case was decided after *Channell v. Ditchburn*, and there was also prominent in it the question of the agency of partners in the matter of partnership business after a dissolution of the firm. The court set aside a verdict for the defendant without stating the grounds of decision, or assigning any reason except that they could not forbear to act on the numerous authorities.

There is another class of cases which will throw light on the principle involved in the matter under discussion. I refer to those decisions which hold that payment by one promisor after the death of his co-promisor will not revive the debt as against the personal representatives of the latter. Of this class *Atkins v. Tredgold*, 2 B. & C. 23, is the leading case. The suit there was against the executors of John Tredgold on joint and several promissory notes made by John Tredgold and Robert Tredgold, bearing date respectively January 17, 1806, and January 17, 1809. John died in March, 1810, and Robert continued to pay the interest until May, 1816. The court, consisting of ABBOTT, C. J., BAYLEY, HOLROYD and BEST, JJ., held that the payments made after the testator's death did not take the case out of the statute. All the judges distinguished the case from *Whitcomb v. Whiting*, and declared their unwillingness to extend the principle of that decision. BAYLEY, J., speaking of *Whitcomb v. Whiting*, distinguished that case from the case then before the court, in that the statute had attached before the payment was made by Robert; and "therefore," he said,

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"John Tredgold being at that time protected, could not be subjected to any new obligation by the act of Robert." HOLROYD, J., referring to *Whitcomb v. Whiting*, said: "That case has gone far enough, but it does not govern the present. There the defendant Whiting was liable upon a joint promise at the time the payment was made. The court decided that when one of two joint promisors pays a part, that was to be considered in law as a payment by both. But here, at the time when the payment was made, the joint contract had ceased to exist; for it was determined by the death of John Tredgold."

Turning from the English decisions to the cases in our courts, we find *Whitcomb v. Whiting* approved and followed in *Corlies v. Fleming*, 30 N. J. L. 349. In that case the suit was commenced July 11, 1861, against the two defendants, on a joint and several note given by them and one Farrington, since deceased, dated September 4, 1850. The interest on the note had been paid by Fleming every year to the year 1860 inclusive. Each payment of interest was made at a time when the joint liability of the defendants existed, and each one of these payments renewed the joint obligation for six years. *Disborough v. Bidleman's Heirs*, 21 N. J. L. 677, approved *Whitcomb v. Whiting*, and followed *Atkins v. Tredgold*. The suit was against the heirs of a deceased obligor on a bond which was joint and several. This court, and the Court of Errors, held that a payment on the bond by the surviving obligor, after the death of his co-obligor, did not take the case out of the statute as against the heirs of the latter. This decision was made on the authority and reasoning of *Atkins v. Tredgold*, that the payment was not made whilst the joint obligation of the two parties existed, and that the agency of the one to act for and bind the other ceased when their joint liability was ended. *Whitcomb v. Whiting* was again approved in this court in *Merritt v. Dey*, 9 Vroom, 32; s. c., 20 Am. Rep. 362. That suit was against partners on a firm note. The payment by one partner, which was regarded as taking the case out of the statute, though made after the dissolution of the partnership, was before the time of limitation had lapsed. The chief justice in his opinion gives that circumstance special prominence, and in commenting on *Whitcomb v. Whiting*, deduces "a right * * * in either of the joint debtors to arrest by his sole act the running of the statute," "from the existence of the joint indebtedness," and "infers from the fact of the joint obligation

and the unity of interest the agency to renew the contract as against the force of the statute."

We are bound by *Whitcomb v. Whiting*, for the reason I have mentioned; but the other English cases I have cited we are under no constraint to follow, except so far as they have already been adopted by our courts. The doctrine that a joint debt, when once barred by the statute, can be revived as against all the original debtors by the unauthorized act of one of them, adjudged in *Channell v. Ditchburn* and *Goddard v. Ingram*, has neither reason nor justice for its support. That such a doctrine was considered as either unjust or unwise is shown by the fact that in England it has been overturned by act of Parliament. 19 and 20 Vic., chap. 97, § 14. The true principle on which *Whitcomb v. Whiting* rests is that of the agency of joint debtors for each other, inferred from the unity of their interest, which makes the act of payment by the one the act of all — an agency which arising out of the joint indebtedness subsists only so long as the joint indebtedness continues, and ceases as soon as the joint liability being determined, the parties become as strangers to each other. *Atkins v. Tredgold*, and *Disborough v. Bidleman's Heirs*, were decided on this reasoning, and there is no rational distinction between the determination of the joint interest of the parties by death and its termination by the bar of the statute of limitations, which makes the lapse of time a positive and legal bar in all cases within its provisions. *Thorpe v. Corwin*, Spenc. 311.

I have not referred to cases in the courts of our sister States. *Whitcomb v. Whiting* has given rise to so much discussion, with great diversity of views, and been so denied and qualified, not only by judicial decisions but by legislation, that a reference to the American cases would be of little profit. The courts of some of the other States have adopted the same views on this subject that we have expressed, as will be seen by the notes to *Whitcomb v. Whiting*, 1 Sm. Lead. Cas.

The verdict should be set aside and a new trial granted.

New trial granted.

CREVELING v. BLOOMSBURY NATIONAL BANK.

(46 N. J. Law, 255.)

Negotiable instrument — check — action against drawee.

No action lies in favor of the holder of a check against the drawee before acceptance.*

ACTION on a check. The opinion states the case.

Oscar Jeffery, for plaintiffs.

C. F. Fitch, for defendants.

SCUDDER, J. On general demurrer to this declaration the question is raised whether the holder or payee of a check can sue the bank on which it is drawn for a refusal to pay it, where the check is regularly made, delivered, presented for payment, and the maker has funds in the bank on deposit sufficient to pay it. Decidedly opposing views are held in different courts on this point, and the subject has been very fully discussed in cases and text-books. I consider the law well settled in our State on what has been regarded as the weight of authority and the usage of banks and their dealers for many years. Our reports are silent on this subject, because no such action has been brought, or if brought it has not been supposed to be maintainable. Checks have been classed generally with inland bills of exchange, though differing in some respects, and held not binding on the drawee until there has been a presentation and acceptance by the bank in some form. Being payable on demand, such acceptance is by payment, or by credit given to the holder, and charge against the drawer, or by certification. If unpaid on presentation the holder has his remedy against the maker or indorser; and the maker has his against the bank for damages sustained to this credit, or otherwise, by the illegal refusal to pay his check when drawn against funds remaining in the bank. Cases that I have examined in our reports do not directly meet the question at issue here, and because there has been doubt

* To same effect, *Dickinson v. Coates* (79 Mo. 251), 49 Am. Rep. 228; *Harrison v. Wright*, 100 Ind. 516.

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expressed by some text writers, and dissent in some courts of other States, I have thought it advisable briefly to review some of the more prominent cases to learn whether we are right in the position we have assumed. Having no binding authority in our State we are free to accept the rule which is best approved and supported by authority and usage elsewhere. The question is very fairly discussed in 2 Dan. Neg. Inst., § 10, ¶ 1635; in *Morse Banking*, 459, and 2 Pars. Notes and Bills, 61, 62.

A few of the later cases which refer to others, state the rule and the reasons for it, which in my judgment should be adopted in this State as governing the subject. *Bank of Republic v. Millard*, 10 Wall. 152, expressed the unanimous opinion of the Supreme Court of the United States. They say that on principle there can be no foundation for an action on the part of the holder of a check, unless there is a privity of contract between him and the bank, and ask how can there be such privity when the bank owes no duty, and is under no obligation to the holder? Quoting from a leading case (*Chapman v. White*, 6 N. Y. 417), they further say that the right of the depositor is a chose in action, and his check does not transfer the debt or give a lien upon it to a third person without the assent of the depository. This is said to be a well established principle of law, and sustained by the English and American authorities. In *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325; s. c., 27 Am. Rep. 551, the entire court say that *Lunt v. Bank of North America*, 49 Barb. 221, declares the rule accurately, that checks drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole, or any part of any account standing to the credit of the drawer, but containing only the usual request, are of the same legal effect as in inland bills of exchange, and do not amount to an assignment of the funds of the drawer in the bank. This they say is the settled law of that State, as it has been repeatedly affirmed in that court. In *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 86; s. c., 7 Am. Rep. 314, ALLEN, J., in giving the opinion of the court, says the cases all agree that notwithstanding the agreement which bankers make with their customers to pay their checks to the amount standing to their credit, a check holder can take no benefit from this agreement, and that the check does not operate as a transfer or assignment of any part of the debt, or create a lien at law or in equity. *Carr v. National Security Bank*, 107 Mass. 45;

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s. c., 9 Am. Rep. 6, after discussing the question, concludes that the bankers' promise to the drawee to honor his checks does not render them, while still liable to account with him for the amount of any check as part of his general balance, liable to an action of contract by the holder also, unless they have made a direct promise to the latter by accepting the check when presented or otherwise. This view, they say, is in accordance with the law as established in England, in New York and in Pennsylvania, with the opinions theretofore expressed by that court, and with the recent unanimous decision of the Supreme Court of the United States. *Bank of the Republic v. Millard*, above cited.

To the same effect is *Lloyd v. McCaffrey*, 46 Penn. St. 410, 414, and *Mason v. Franklin Bank*, 34 Md. 580.

Two recent English cases have considered the right of the holder of a check against bankers. In *Hopkinson v. Forster*, L. R., 19 Eq. 74, Sir GEORGE JESSEL, master of rolls, says a check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. The banker is bound by his contract with a customer to honor the check when he has sufficient assets in his hands; if he does not fulfill his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. He also says, "I do not understand the expressions attributed to Mr. Justice BYLES, 8 C. B. (N. S.) 372, but I am quite sure that learned judge never meant to lay down that a banker who dishonors a check is liable to a suit in equity by the holder." The other English case to which I have reference is *Schroeder v. Central Bank of London*, 34 L. T. (N. S.) 735. The statement of the claim in this case was on a check payable to bearer, on the defendants, which was handed to the plaintiffs, who presented the check to the defendants at their bank for payment, but payment was refused and the check marked "refer to drawer;" and that at the time when they refused payment of the check the defendant had funds belonging to the drawer to an amount exceeding the sum for which the check was drawn. To this statement a demurrer was filed, on the ground that a banker on whom a check is drawn is under no liability to the holder of the check to pay the same. That is the present case, in all particulars; and the court say a check is not an assignment by the drawer to the payee of a debt, or chose in action, within the meaning of the Judicature act of 1873, section 25, subsection 6. Therefore the

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payee of a check has no right of action for its dishonor against the banker on whom it is drawn. Neither is the check in this case an assignment under section 19 of the Practice act, which will authorize the holder or assignee to sue in his own name.

It will be found that some of the cases in this country, above referred to, have considered those that hold a contrary rule, which are comparatively few in number, and have refused to follow them. The grounds for their conclusions above stated in the cases quoted are so satisfactory that nothing can be added to give weight to their authority. The opposite view may be briefly stated, that before demand for payment of the check has been made of the banker there is no assignment and no privity between the holder and the banker ; but the act of presentment and demand, made before the appropriation of the funds in hand, creates, by usage of business and the understanding of all concerned, the obligation, the privity and the appropriation, or at least the right to claim appropriation. *Morse Banking*, 471. Where no such understanding or usage exists, and the banker has no contract with the holder of a check, and on presentation of the check promptly refuses to honor it, it is difficult to see by what act on his part the privity between him and the holder of the check is established.

The question can rarely be raised between a solvent bank and its depositors, except where there are counter claims held by the bank against the depositors, or questions of overdraft, priority of checks or notice stopping payment, and these the bank should have the right to settle directly with its customer, and not be annoyed by many suits on checks in the hands of third parties among whom the deposits may have been divided. Whatever other reasons may be suggested on the one side or the other, it is sufficient to say that in our judgment the weight of authority is against the maintenance of this action, and judgment will be given for the defendant on the demurrer.

Judgment for defendant.

MEEHAN V. FREEHOLDERS OF HUDSON.

(46 N. J. Law, 270.)

Office and officers — action for salary by one not entitled to office.

One getting possession of a public office forcibly and without authority cannot recover the salary thereof from the public.

ACTION for salary of office. The opinion states the case.

Job H. Lippincott, for the rule.

Gilbert Collins, contra.

KNAPP, J. The action was brought to recover salary payable to the warden of the penitentiary of Hudson county for services alleged to have been performed by plaintiff in that capacity from September 5, 1882, to June 12, 1883. The cause went down to the Hudson Circuit for trial, and it was there, by agreement of counsel, referred. The referee to whose decision the case was submitted found in favor of the defendant, reporting the facts specially found by him upon which his conclusion was rested. His report now being before us for confirmation is opposed by plaintiff, who asks that judgment be entered for him upon the facts found, or that a new trial be ordered, he alleging that such finding of facts entitle him to a judgment against the defendant. The plaintiff also insists that the facts found are too favorable for the defendant upon the evidence, and that at least a new trial for that cause should be granted.

From the statement made to us of the evidence, without referring to it in detail, we conclude that the findings of fact by the referee are supported by the evidence. The only question which we think necessary to consider is whether upon those facts the report of the referee should have been the other way. The argument of this cause places the plaintiff's right of recovery solely upon assumed legal results of the judgment of the Court of Errors in *Stuhr v. Curran*, 44 N. J. L. 181; s. c., 43 Am. Rep. 353, and it is conceded that the plaintiff, who was not legally in office, although rendering services belonging to it, has no claim against the freeholders for the salary demanded unless such claim can be rested upon the adjudica-

tion just mentioned. In that case it was held that where one of two opposing candidates for an office had received the certificate of election from the proper canvassing board, and had performed the duties incident to the office, in obedience to apparent requirement of the law, honestly believing in and having no reason to doubt the legality of his title to such office, although subsequently ousted on *quo warranto*, he was entitled to retain for services performed the salary paid to him, and was not liable to pay it over to him who by subsequent adjudication was found to be legally elected. It is unnecessary to go through the exhaustive discussion which that case elicited, or to examine in any detail the views expressed or authorities referred to in the prevailing opinion of that court. It is sufficient to say that the case in hand has features essentially different from those characterizing the case of *Stuhr v. Curran*, and such as, under views there clearly recognized, would as we think, if present in that case, have met with the application of a different rule. No case was cited in either of the able opinions there delivered, nor any view hinted at which countenanced the right of a fraudulent intruder upon or ouster of another from office which rightfully was in the possession and enjoyment of such other, to demand or retain the pay of the office. It was forcibly urged in the minority opinion read in that case, that the regularity of the certificate of election, the honest belief of the defendant in that case, that he was only in the discharge of legal duty in entering upon and performing the work appertaining to the office to which he apparently was elected, and his possible liability to penalties for a refusal to discharge those duties, were not circumstances that should prevail against the right of the *de jure* officer to recover from the other the compensation which he had received for his services, but no one suggested even that as against one entering knowingly into the place of another by force or fraud, any consideration of justice or good policy could stand in aid of such wrong-doer, either to recover compensation belonging to the office from the public disbursing officer, or in withholding that which he had received against the legal demands of him who had been so defrauded. On the contrary, it is said in the opinion read by Mr. Justice VAN SYCKEL that "if fraud were imputable to the defendant the case would present a different aspect," and we are clearly of opinion that giving to that case the full force which it was designed to have, it is not in conflict with the right of the *de jure* officer to demand, and have

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from one in the position this plaintiff is found to be, fees and emoluments received by him from the public disbursing officer belonging to said office. In this case the referee finds that the plaintiff, with full knowledge that the office to which he was nominally elected was already filled, and that no vacancy existed at the time of his appointment, and that the incumbent held the office by a term which ran beyond the time when the board of chosen freeholders, as then constituted, had power to choose a successor, that with this knowledge he solicited and procured a resolution for his own appointment to the office already filled, and then gained its possession by forcibly ejecting the lawful incumbent and putting himself in it by a trespass. Under such a state of facts we have no hesitation in declaring that if the official fees, during the time the plaintiff was so in occupancy, are due to any one, the plaintiff is not that person. It was not the design of the judgment in the Court of Errors, nor is it its legitimate effect, to give countenance or encouragement to those who are willing by force or fraud to obtrude in places lawfully assigned to others nor to permit such person to profit by the emoluments belonging thereto. The reasons which protect one who has performed the services belonging to a public office, under an appointment apparently regular and legal, in ignorance of, and without the means of ascertaining defects in his title, and where his refusal to serve would leave a vacancy in office, whether such reasons be weak or strong, have no application to a case like this. In such a case we cannot doubt that in some form the officer *de jure* would be entitled in law to demand and have compensation for the injury done him by such an intruder. If payment be made to the officer *de facto* the public will be protected from further claim, as the disbursing officer is not bound to know the title by which an actual incumbent holds, and the rival claims to the fund must be litigated between the individual claimants; but upon suit brought by the incumbent against the public for pay, his title will be inquired into. *Dolan v. Mayor, etc.*, 68 N. Y. 274; s. c., 23 Am. Rep. 168. And he must establish his right to be paid as between the plaintiff and the public represented by the defendant. The plaintiff should not recover in this action on the ground that the services performed by him, under the circumstances here presented, were purely voluntary. The board of chosen freeholders that went through the form of appointing the plaintiff had power, and it was their duty to fill the office of war

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den of the penitentiary whenever it should fall vacant, but the act of that body in the attempt to put the plaintiff in that position when it was already filled was a mere nullity, which, as the referee finds, he and they well knew, or were chargeable with that knowledge. He solicited their action and knew that it was illegal; he was not invited or permitted to assume the duties of that office, but by a trespass gained admission to the place which he knew was lawfully filled by another, turned that other out and kept him out until by legal judgment he was himself removed. He was there without legal pretext. We are at a loss to see how this can be regarded as an employment, or be considered other than the veriest volunteer in rendering services in the position. For services thus performed there is no legal promise or obligation to pay, either express or implied. The salary attached to the office was not promised to him nor was it his due. He bargained for the chances of being voluntarily paid by defendant. *Dill. Mun. Corp.*, §§ 168, 169, and cases cited; *City of Hoboken v. Gear*, 27 N. J. L. 265; *Smith v. Mayor*, 37 N. Y. 518.

The report of the referee should be confirmed and judgment entered for the defendant.

GROVE v. MOTT.

(46 N. J. Law, 323.)

Constitutional law — militia — disbanding.

The action of a division commander of State militia in disbanding a company for mutiny is cognizable only by the military authorities.

CERTIORARI. The opinion states the case.

J. Augustus Fay, for prosecutors.

James N. Stratton, contra.

PARKER, J. The writ in this case was directed to Gershom Mott, major-general commanding the division of the National Guard, and Elihu H. Ropes, colonel of the Third Regiment, on relation of Captain Charles A. Grove and others, alleging them-

selves to be members of Company F, Third Regiment, National Guard of New Jersey, commanding them to make return, and send to this court, all proceedings had or taken before them, or either of them, in reference to the disbanding of said company.

By the return made to the writ, it appears that on the 29th day of August, 1883, Elihu H. Ropes, colonel commanding the Third Regiment, sent to Major-General Mott, through the regular military channel, a communication reporting that Company F of said regiment had recently, on more than one occasion, shown a mutinous spirit, and was in a demoralized condition, a majority of its members having openly declared that they would not parade if the first lieutenant was to have command, and that the captain (who was sick) felt obliged to issue a printed circular, appealing to the men to obey orders, out of respect for himself and the colonel. The communication of Colonel Ropes to the major-general concluded with a request that the said company might be disbanded.

On the 25th day of September, 1883, the following order was issued from division headquarters, by Major-General Mott, to wit: "Special order No. 9. It having been officially reported to these headquarters that company F, Third Regiment, has become inefficient, and been guilty of mutinous conduct, the same is hereby disbanded, and the officers placed on the retired list. The quartermaster-general will immediately take possession of the State property."

This is the order of which Captain Grove and the other relators, who were members of said company, complain, and which they ask this court to set aside.

The major-general justifies his action under the sixth and twelfth sections of the act for the organization of the National Guard, found in Rev., p. 679. The sixth section provides that whenever any company, battalion or regiment shall be guilty of mutinous conduct, the same may be disbanded, or consolidated with other corps, by the division commander. By the twelfth section it is provided that if the corps to which the officers belong be disbanded, the officers shall be placed on the retired list.

The complaint is, that the officers and men of the company affected by the order of the major-general, had no opportunity to be heard upon the charge of mutinous conduct, that no notice was given them of such charge; and they say that if a hearing had been given them, either by the colonel before he reported, or by

the division commander before he issued the order of disbandment, it would have appeared that there had not been any mutinous conduct on the part of the company.

Depositions under the rule were taken, but it will not be necessary to consider the voluminous testimony adduced, unless the preliminary question of jurisdiction be decided in favor of the prosecutors of the writ. Unless this court has jurisdiction, it is manifestly improper to express an opinion upon the mooted questions of fact raised by the evidence.

It is admitted that no application has been made to the commander-in-chief, by or on behalf of the officers or men, or any of them, for a review of the proceedings, in order to set aside or modify the action of the major-general.

The defendants claim that this is not a case for the interposition of the civil courts. They contend that it is a matter to be settled under the military law, by the military authorities; and that if any wrong has been done to the men composing the company, or to the officers thereof, by the order of the major-general, such wrong should have been redressed, and the order rescinded, by exhausting their military remedy.

There is military law in this State, consisting of statutes and usage sanctioned by time. Beyond its legitimate sphere, it must give way to the jurisdiction of the civil courts, but within its proper sphere it must control. The constitutional provision declaring the military to be in subordination to the civil power does not take from the military authorities matters relating to the organization of the militia, which are of a strictly military nature.

By military law is not meant martial law. By some text-writers, and not a few judges, these terms have been used interchangeably. Hence some confusion exists as to the true signification of the term "military law."

Martial law presupposes the existence of a state of actual war, and the occupation of the district where it exists by a hostile force, interrupting the civil courts in the administration of law in their accustomed mode. Military law does not do this. It is part of our body of law, fully recognized by the civil courts, and is in force in time of peace as well. It is that law which relates to the organization, government and discipline of the military forces of a State. It is a rule superadded to the civil law, for regulating the citizen in his character of soldier, and is binding on those to whom it is intended

to apply. The military authorities have cognizance and entire control over the organization of the militia within the law enacted on that subject.

The material question is, whether the disbanding of a company of the National Guard, and placing its officers on the retired list, is a matter relating only to organizations, and consequently of a merely military nature. If so, the civil courts have not jurisdiction.

By the Constitution of the United States the authority to train its militia, as well as to appoint the officers, was reserved to the States respectively. The Constitution of New Jersey directs that the legislature shall, by law, provide for enrolling, organizing and arming the militia of the State. The legislature has passed an act for the organization of that part of the militia called the National Guard, by which the power to disband or consolidate companies is given to the division commander.

From an early period of the existence of the State government, the Supreme Court has undoubtedly taken cognizance of some cases arising under military law, but upon examination it will be found that those cases did not relate to the organization of the military forces, but to some alleged illegal enforcement of fines or penalties, involving the personal rights of individuals, by way of pecuniary loss. Numerous cases in this and other States show that in matters affecting organization, the civil courts have declined to interfere with the military tribunals, and have conceded that alleged errors or unjust procedure on that subject must be settled by the military authorities.

To prove that the construction here given is sustained by reported decisions, reference will now be made to cases.

The first case reported in New Jersey is that of *State v. Chambers*, 1 N. J. L. 400. It involved the alleged illegality of an assessment on property of the prosecutor. It was alleged that the proceedings of Captain Chambers were erroneous in his mode of conducting the classing and assessment, under the military law then existing. Leak, the counsel of defendant, contended that a *certiorari* would not lie to the captain, who acted in a military capacity, but the court sustained the writ, evidently on the ground that an assessment had been made, which involved the property of the prosecutor.

In the case of *State v. Davis*, 4 N. J. L. 311, the writ was sustained, because a court composed of military officers, whose decisions, by statute, took effect upon the persons and property of individuals,

had proceeded against the prosecutor of the writ by way of fine, to compel obedience to an order connected with a draft. In the opinion in that case, the court referring to the military law, which it erroneously styled martial law, said: "In the execution of this law, there are courts of various grades, and from the inferior, there is a revision by the superior, and ultimately by the commander-in-chief; and so long as they keep themselves within their jurisdiction, the civil courts cannot interfere." The opinion then adds: "When the law imposes a penalty, or sets a fine, it may be adjudged in the known and established courts of law having cognizance thereof, according to the usual course of such courts."

In *State v. Kirby*, 5 N. J. L. 835, a *certiorari* was allowed at bar, to bring up tax warrants against delinquents in military service, who had been fined, and to collect which distress warrants had been issued.

The case, *State v. Atkinson*, 9 N. J. L. 337, was also where delinquents had been fined, and executions issued.

It will be seen that in all the cases to which reference has been made, fines and penalties have been inflicted, involving the property of individuals. There is not a case where a matter involving organization, merely of the militia, has been entertained by the Supreme Court of this State.

There are some reported cases in the courts of other States, which shed light on this subject.

In 4 Pick. 25, it is stated that one Joseph Adams had belonged to a military company in the town of Heath. The company had manifested a determined opposition to the requirements of the military law, was reduced to a state of disorganization, and was insubordinate. The proper military authority had disbanded the company, and annexed its military authority to the adjoining towns. This was done under the statute of Massachusetts giving power to arrange and organize the militia of that State into divisions, brigades, battalions and companies. The court held that admitting the proceedings to disband the company to have been irregular, still a *certiorari* would not lie, and remarked that to restore the company to its former footing, the application should be made to the executive, as commander-in-chief of the military forces of the State.

Proctor v. Stone, 1 Allen, 193, was an action of tort, brought against the adjutant-general of the State, for entering the armory of a company of militia that had been disbanded by the proper

military authority, and removing the arms and equipments belonging to the State. The statute of Massachusetts was similar to that of New Jersey in this regard, except that the original power to disband a company in that State was given to the governor with consent of his council, instead of vesting the power in the first instance, in the division commander, as is the case under our law. In that case, the court held that the legal and constitutional power to disband the company was with the military authorities, whenever in their judgment, there was sufficient cause to exercise that power. To the report of the case cited from 1 Allen, is appended a note, giving the opinion of all the judges of the Superior Judicial Court of the State of Massachusetts, in the year 1837, in answer to the request of Governor Edward Everett, for a construction of the statute purporting to give power to disband corps of the militia. This opinion sustains the decision in 1 Allen, and declares that the power is with the military tribunals, to which it is intrusted by the statute.

In 25 Barb. 216, the case of *People v. Scrugham* is reported. There had been a general order, assigning Lockwood to the command of the Seventh Brigade, which order had been revoked, and the command of the brigade assigned to Scrugham. On application for mandamus, the court held that it had no right to review the general order assigning Scrugham to the command, because the commander-in-chief of the military forces of the State, to whom the relator and every other officer in the militia owed obedience, was the ultimate judge, and that the Supreme Court had no jurisdiction in the matter. The court further held that Lockwood's commission was not revoked by the order complained of, that he was still a general of militia, but without present command.

A case reported in 10 Me. 145, *Gould v. Hutchings*, at first view, might be thought antagonistic to those before cited, but upon examination it will be found to sustain them. An action had been brought to recover a penalty for neglect of duty in a military company. The alleged delinquent had belonged to another company, which had been disbanded and annexed to the company in which the delinquency occurred. The court took cognizance of the case only because the penalty attached was about to be enforced. This case is not therefore inconsistent with the general doctrine hereinbefore stated.

In Connecticut, it was held that the question to which company

a soldier belongs, and ought to do duty in, is entirely a matter of military cognizance, and determinable by the officers of the militia. *Loomis v. Simons*, 2 Root, 454.

In the case of *People v. Ewen*, 17 How. Pr. 375, it was held that the governor of the State, as commander-in-chief, had power to consolidate companies, and that the Supreme Court could not lawfully interfere with such power. The opinion in that case shows that the court fully considered the practical application and effect of an order disbanding or consolidating corps, and it holds that such action does not deprive an officer belonging to a disbanded company of his commission, nor take from him any privilege contrary to the Constitution. The court said that he might be legally deprived of his command, but not of his office, and although he became supernumerary, and had no present command, the order was not prohibited by the Constitution. Deprivation of office is all that is prohibited, and no breach of the Constitution being found, the court would not inquire whether the action of the military authorities was expedient.

From these and other decisions to the same effect, the line of demarkation between the jurisdiction of the civil and military tribunals is fixed; by determining whether the question involved relates to the organization and discipline of the corps composing the military forces of the State, or whether any civil disability, fine or penalty attaches. In the latter case, the Supreme Court will entertain a writ of *certiorari*, but in the former, only the military authorities can act, and if the action of the inferior military tribunals be not satisfactory, recourse can be had only to the commander-in-chief.

In the case now before this court, the rights of no one have been encroached upon. Neither officers nor men have incurred any civil disability. The officers have not been cashiered, nor the men dismissed the service. No fine nor penalty has been imposed.

A company in one of the regiments of the National Guard has been disbanded, and the officers put on the retired list, and that is all. No disqualification attaches to the relators, by reason of the order of the major-general. The men are not debarred from joining other companies in the organization. The officers placed on the retired list still hold their commissions, and may be assigned to military duty by their superior officers. They are still carried on the register, hold the rank upon which they are retired, and are

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entitled to wear the uniform of such rank. In fact, none of their personal rights or property interests have been invaded. The only result of the action of the major-general is, that in supervising and perfecting the organization of the National Guard, he, as division commander, to whom the power is given by our statute, disbanded a company of one of the regiments, and left its officers without active command. If the officers and men of the company ordered to be disbanded considered themselves aggrieved by the order, they had the undoubted right to lay their grievances before the commander-in-chief for investigation. He would doubtless have given them a patient hearing through testimony taken in his presence, or by directing a court of inquiry to ascertain and report the facts. That was the legal course to be pursued by the relators.

The order complained of relates only to organizations, and is not reviewable by the Supreme Court. Should this court assume jurisdiction, and interfere with the discretion of the military authorities in disbanding or consolidating corps of the militia, it would palsy an important arm of executive power, created and sustained by the legislative branch, for the preservation of order, and necessary, as events have proved, for the protection and preservation of civil government. The only safety is for each department to act within its legitimate sphere. There is no place on the bench for a military commander, nor is their room on the same saddle for the court and a major-general.

The argument that the section of the act, under which Major-General Mott placed the officers of the disbanded company on the retired list, is in conflict with the Constitution of the State, is fallacious. It is contended that it violates article VII, section 1, paragraph 6, which forbids the removal from office of commissioned officers of the militia, except through sentence of a court-martial. The answer is, that the officers of the disbanded company have not been removed from office. The framers of the National Guard act knew the difference between taking away an officer's commission and placing him on the retired list. By placing Captain Grove and the other officers of the company on the retired list, the division commander kept within constitutional requirement, and did not only what the Constitution permitted and the law authorized, but pursued a course sanctioned by long military usage.

This court not having jurisdiction over the subject-matter brought here by the writ, it is dismissed, but without costs.

COWLEY V. SMYTH.

(46 N. J. Law, 380.)

Fraud — representation by director of solvency of bank.

Where a depositor in a savings bank sues a director for deceit in representing that the bank was solvent and that it could not be insolvent without his knowledge, as he was on the finance committee, there can be no recovery unless there was a fraudulent purpose to deceive, and that is a question of fact.*

ACTION for false representations as to the solvency and condition of a bank, whereby the plaintiff was induced to leave his deposit, which was lost by the subsequent failure of the bank. The judge charged :

1. That if the defendant made the representations as matter of his own knowledge, and so positively asserted that he knew the fact to be as he represented, and the fact was not as he represented, although he may not have known them to be false, and the plaintiff acted upon the representations, they not being true, and suffered damage, the plaintiff may recover.

2. That if he asserted the fact as to the condition of the bank of his own positive knowledge, and did not in fact know what its condition was, then the plaintiff, acting upon that, and being injured, would be entitled to recover.

E. S. Cowles, for plaintiff.

Bentley & Hartshorne, for defendant.

DEPUÉ, J. This action is an action on the case for deceit. There is a distinction between relief, either affirmative or defensive, in courts of equity, on the ground of fraud, and the remedy for fraud in a court of law. Courts of equity grant affirmative relief by way of reformation or cancellation of instruments, and even defensive relief in proceedings to enforce an obligation or liability, on the ground of constructive fraud, such as would afford no relief in law, especially by action for deceit. 2 Pom. Eq. § 872; *Arkwright v. Newbold*, L. R., 17 Ch. Div. 302, 317, 330; *Redgrave v. Hurd*, 20 id. 1, 12; *Ross, etc., Mining Co. v. Smith*, L. R., 4 H. L. Cas. 64, in which Lord

*See *Westervelt v. Demarest*, ante, p. 400.

CAIRNS held that "if persons make assertions of facts of which they are ignorant, whether such assertions are true or untrue, they become in a civil point of view as responsible as if they had asserted that which they knew to be untrue," is an instance of equitable relief by way of rescission. The bill was filed by a subscriber for stock to be relieved from a subscription induced by false representations as to the property of the corporation. In that case, as appears in the report of L. R., 2 Ch. App. 604, the directors issued the prospectus containing the false statement on the faith of representations of the vendor of the property and without any knowledge of their untruth, and a subscriber for stock, who was misled by the misrepresentations, was relieved in equity from his subscription. The doctrine of equitable estoppel, or estoppel *in pais*, which has been adopted by courts of law from the courts of equity, also presents considerations which do not apply to an action for deceit. The theory on which that doctrine is founded is that a party should not be allowed to retract an admission or affirmation which was intended to influence the conduct of another, if the retraction would materially injure the latter. *Phillipsburg Bk. v. Fulmer*, 31 N. J. L. 52, 55; *Campbell v. Nichols*, 33 N. J. L. 81, 87. The cases which hold that an agent, who without competent authority, induces another to contract with him as the agent of a third party, is liable in damages without regard to his moral innocence in the supposition that he had the authority he assumed to have, also rest on a special ground—on the ground of an implied warranty of authority. *Randall v. Trimen*, 16 C. B. 786; *Collen v. Wright*, 8 E. & B. 647, 656; *Richardson v. Williamson*, L. R., 6 Q. B. 276, 279; *Weeks v. Probert*, L. R., 8 C. P. 427. The observation of Lord HATHERLY, that "if a man misrepresents a fact, to that fact he is bound if any other person, misled by such misrepresentation, acts upon it and thereby suffers damage," was made with respect to cases of this kind. *Beattie v. Lord Ebury*, L. R., 7 H. L. Cas. 102, 130.

The action of deceit, to recover damages for false and fraudulent representations, differs in principle from the cases that have been referred to. In such an action a false representation, without a fraudulent design, is insufficient. There must be moral fraud in the misrepresentations to support the action. *Paisley v. Freeman*, 3 T. R. 51, and *Haycraft v. Creasy*, 2 East, 92, are the leading cases on this subject. Both of these cases were decided by a divided court. In *Paisley v. Freeman*, the question arose on a motion in

arrest of judgment. The count in the declaration which gave rise to the motion averred that the defendant, "intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage the plaintiffs to sell and deliver to one J. C. F. divers goods * * * upon trust, and did for that purpose * * * falsely, deceitfully and fraudulently assert and affirm to the plaintiffs that the said J. C. F. * * * was a person safely to be trusted and given credit to, and did thereby falsely, fraudulently and deceitfully cause and procure the plaintiffs to sell and deliver said goods * * * upon trust and credit to the said J. C. F." The count also contained an averment that J. C. F. was not a person safely to be trusted and given credit to, and that the defendant well knew the same. The court held that a false affirmation, made with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit, and that as a matter of pleading, *fraudulenter* without *sciens* or *sciens* without *fraudulenter*, would be sufficient, but that the fraud must be proved. *Haycraft v. Creasy* was before the court on a rule for a new trial, after a verdict for the plaintiff. In that case the defendant, to an inquiry by the plaintiff concerning the credit of another, made the representation that the party might safely be credited, and that he spoke this from his own knowledge and not from hearsay. The court (GROSS, LAWRENCE and LE BLANC, JJ., Lord KENYON dissenting), held that the action could not be maintained, it appearing that the representation was made by the defendant *bona fide* and with a belief of the truth of it. GROSS, J., said: "It is true that he (the defendant) asserted his own knowledge upon the subject; but consider what the subject-matter was of which that knowledge was predicated. It was concerning the credit of another, which is a matter of opinion. When he used these words therefore it is plain that he meant only to convey his strong belief in her credit, founded upon the means he had of forming such opinion and belief. There is no reason for us to suppose, that at the time of making those declarations, he meant to tell a lie and mislead the plaintiff." LAWRENCE, J., said: "The question is whether, if a person asserts that he knows such a one to be a person of fortune, and the fact be otherwise, although the party making the assertion believed it to be true, an action will lie to recover damages for an injury sustained in consequence of such misrepresentation. * * * Stress has been laid on the defendant's assertion of his own knowl-

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edge of the matter ; but persons in general are in the habit of speaking in this manner without understanding knowledge in the strict sense of the word in which a lawyer would use it. * * * In order to support the action the representation must be made *malo animo*. It is not necessary that the party should gain any thing for himself by it. If he make it with a malicious intention that another should be injured by it, he shall make compensation in damages. But there must be something more than misapprehension or mistake." LE BLANC, J., said : " By fraud I understand an intention to deceive. Whether it be from any expectation of advantage to the party himself, or from ill will toward the other, is immaterial. The question here is whether the defendant's saying that which, critically and accurately speaking, was not true, but not having said it with intention to deceive, brings this case within *Paisley v. Freeman*. I think not."

The Court of Queen's Bench departed from the doctrine of *Haycraft v. Creasy* in two cases and held that an action at law might be maintained for false representations, though there was neither fraud nor negligence. *Fuller v. Wilson*, 3 Q. B. 57 ; *Evans v. Collins*, 5 Q. B. 804. But *Wilson v. Fuller* was reversed on error (3 Q. B. 68, 1009), and the question was finally set at rest in the English courts in *Taylor v. Ashton*, 11 M. & W. 401, and *Ormrod v. Hutth*, 14 M. & W. 651. In *Taylor v. Ashton* the suit was against the directors of a banking company for publishing a false report of the condition of the bank. The report had been prepared by the officers of the company and adopted at a meeting of the directors. The judge charged the jury that they must be satisfied that a fraud — that is, a moral fraud — had been committed by the defendants. The jury, under this instruction, found for the defendants, stating at the same time that the defendants had been guilty of gross and unpardonable negligence in publishing the report. On motion for a new trial the court held that an untrue representation made for a fraudulent purpose would sustain an action for deceit ; that it was not necessary to show that the defendants knew the representation to be false if it was made for a fraudulent purpose, and that the proper question was left to the jury. In delivering the judgment of the court PARKE, B., said : " It was contended that it was not necessary that moral fraud should be committed in order to render these persons liable ; * * * that the jury found the defendants not guilty, but at the same time expressed their opinion that the

defendants had been guilty of gross negligence and that that, accompanied with a damage to the plaintiff, * * * would be sufficient to give him a right of action. From this proposition," the learned judge added, "we entirely dissent, because we are of opinion, that independently of contract, no one can be made responsible for a representation unless it be fraudulently made." In *Ormrod v. Huth* the action was in case for false representations. The suit arose upon a sale of cotton by sample — the cotton delivered not being equal in quality with the sample. The plaintiff's counsel contended that the delivery of samples not corresponding with the bulk was a false representation of the quality of the cotton, which must be considered, in point of law, as fraudulent, as being the statement of a fact which the party making it did not know to be true. The judge directed the jury that unless they could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practiced in the packing, or had acted in the transaction against good faith or with a fraudulent purpose, the defendants were entitled to a verdict. On error the Court of Exchequer Chamber sustained the charge of the judge. TINDAL, C. J., delivering the opinion of the court, said that "the rule to be deduced from all the cases appears to us to be that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, he cannot recover upon a mere representation of the quality * * * unless he can show that the representation was bottomed in fraud. If indeed the representation was false to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, we think it does not amount to fraud in law. The English courts have considered these decisions as a finality, and it is now there settled that there can be no fraud without dishonest intention — no such fraud as was formerly termed legal fraud. 1 Benj. Sales (Corbin's ed.), § 638.

The American cases, as might be expected of a subject so prolific of decisions, are not altogether harmonious. Mr. Pomeroy, speaking of the cases I have cited from the Queen's Bench as holding that a representation, false in fact, if acted upon, would support an action, and that the defendant's liability was independent of his knowledge or ignorance of its actual falsity, says: "This theory admitted the possibility of fraud at law where there was no moral

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delinquency. It denied that moral wrong was an essential element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American States. These cases have however been overruled, and the theory itself abandoned in England, and generally, if not universally, throughout the States of our own country. It is now a settled doctrine of the law that there can be no fraud, misrepresentation or concealment without some moral delinquency. There is no actual legal fraud which is not also a moral fraud." 2 Pom. Eq., § 884. The English and American cases are fully cited in the notes to *Paisley v. Freeman*, 2 Sm. Lead. Cas. 176-186. They have placed the law on this subject where it was put by *Paisley v. Freeman*, and *Haycraft v. Creasy*, and have, I think, upon principle, as well as by the great weight of authority, established the law on the rational basis that in the action for deceit, moral fraud is essential to furnish a ground of action.

The principle on which the action for deceit is founded being ascertained, the next consideration is with respect to the proof and the proper instructions upon the evidence; for whatever the character of the evidence may be—whether it consists of knowledge of the falsity of the representation or some other fraudulent device intended for the purpose of deception—the evidence must be submitted to the jury under proper instructions. And I think much of the apparent conflict in the cases has arisen from the failure to discriminate between the issue to be proved and the force and effect of the evidence presented.

The simplest form in which the question of the sufficiency of proof arises is where the proof is that the representation was false to the defendant's knowledge. The *scienter* as well as the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and the jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff. *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105; *Polhill v. Walter*, 3 B. & Ad. 114; and *Mylne v. Marwood*, 15 C. B. 778, are cases of this kind. In each of these cases the proof was that the representation was false to the knowledge of the defendant. The jury added to its finding an expression of opinion that there was no fraudulent intent, but the court

nevertheless entered judgment for the plaintiff on the ground that a willful falsehood was a fraud. The language of Lord CAMPBELL in *Wilde v. Gibson*, 1 H. L. Cas. 605, 631, was directed to cases of this aspect; and Jessel, M. R., in a case where it was proved that the representation was untrue to the defendant's knowledge, refused to receive evidence that he in fact believed it to be true. *Hine v. Campion*, 7 Ch. Div. 344.

In other cases of actionable frauds, the probative force and effect of the evidence to establish the fraudulent intent will depend upon the circumstances of the particular case. This question is presented in a complex form where the defendant has added to a representation—which turns out to be untrue, but was not false to his knowledge—an affirmation that he made the representation as of his own knowledge. In such cases the force and effect of the evidence will depend, in a great measure, upon the nature of the subject concerning which the representation was made. If it be with respect to a specific fact or facts susceptible of exact knowledge, and the subject matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertions, and that being untrue, the falsehood would be willful and therefore fraudulent. But where the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition or credit of a financial institution, the assertion of knowledge, as was held in *Haycraft v. Creasy*, "is to be taken *secundum subjectam materiam*, as meaning no other than a strong belief founded upon what appeared to the defendant to be reasonable and certain grounds." In such a case the question is wholly one of good faith. The form of the affirmation will cast the burden of proof on the defendant, but when the evidence is in, the issue is whether the defendant honestly believed the representation to be true. In support of such an issue the defendant may, by way of exculpation, resort to evidence not admissible in actions for other kinds of deceit. He may, as in *Haycraft v. Creasy*, give evidence that the person whose ability he affirmed lived in a style, and with such appearances of property and means, as gave assurances of affluence. He may give in evidence the information he had upon

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the subject (*Shrewsbury v. Blount*, 2 M. & G. 475), and show the general reputation for trustworthiness of the person whose credit he affirmed. *Shoen v. Bumpsted*, 2 H. & C. 193. In fine, he may avail himself of any evidence which may tend to show good faith or probable grounds for his belief, leaving the question to be determined, upon all the evidence, whether his conduct was *bona fide*—whether at the time he made the representation, he honestly believed that his representation was true.

The Massachusetts cases cited to support the instruction certified to the court admit the distinction I have referred to. In *Tryon v. Whittemarsh*, 1 Metc. 1, which was an action for false and fraudulent representations as to the credit of third persons, whereby the plaintiffs were induced to give them credit, a verdict for the plaintiffs was set aside for the reason that the judge should have instructed the jury that the defendant would not be liable if they were of opinion, from the evidence, that he gave an honest opinion, and believed that the persons recommended were trustworthy. In *Hazard v. Irwin*, 18 Pick. 96, the false representation was by a vendor, on the sale of an engine, with respect to its condition. He made the representation as of his own knowledge. The condition of the engine was a fact the vendor could easily have ascertained. The court, SHAW, C. J., cited *Haycraft v. Creasy*, and distinguished it from the case in hand in that the subject matter of the representation was "one of fact in respect to which a person can have precise and accurate knowledge, and in respect to which, if he speaks of his own knowledge, and has no such knowledge, his affirmation is essentially false." In *Page v. Bent*, 2 Metc. 371, the false representation was in relation to the nature and amount of the assets assigned by the defendants. The condition and amount of the assets were peculiarly within the knowledge of the defendants. The court, SHAW, C. J., said, "The principle is well settled that if a person make a representation of a fact as of his own knowledge, in relation to a subject-matter susceptible of knowledge, and such representation is untrue, * * * it is a fraud and deceit for which the party making it is responsible. * * * But in a matter of opinion, judgment or estimate, if he states a thing of his own knowledge, if he in fact believes it, and it is not intended to deceive, it is not a fraud, although the matter misstated is not true. The reason is that it is apparent from the subject-matter that what is thus stated as knowledge must be considered and

understood by the party to whom it is addressed as an expression of strong belief only, because it is a subject of which knowledge, in its strict sense, cannot be had." In *Stone v. Denny*, 4 *Metc.* 152, the action was on a false representation on a sale of property made by the defendant, on a schedule exhibited which he represented as correct of his own knowledge. DEWEY, J., in his opinion, referred to the Massachusetts cases and said: "From an examination of those cases and others bearing upon the question, I apprehend however that it will be found that no real change has been sanctioned in the great and leading principles of law applicable to cases of deceit, and that now, as formerly, to charge a party in damages for a false representation, * * * it must appear that it was made with a fraudulent intent, or was a willful falsehood." The illustration he gives is "of one asserting as of his own knowledge a matter of which he has no knowledge, nor any sufficient ground for making the assertion." The subsequent observation of the learned judge, "that if one positively affirms a fact of his own knowledge, and his affirmation is false, his representation is deemed fraudulent," is unobjectionable as applied to the facts of that case, where because of the subject-matter of the representation, the affirmation of knowledge was to be taken in its strict sense, and not as only a strong expression of belief.

The principle adjudged in *Haycraft v. Creasy* is applicable to actions against directors for false and fraudulent representations concerning the financial condition of the institutions in their charge. It was so applied in *Taylor v. Ashton*, which has become a leading case in the English law. The affairs of such an institution must necessarily be intrusted to executive officers and subordinate agents, and the directors generally cannot know, and have not the requisite ability to learn, by their own efforts, the exact condition of the affairs of the company, and it has been found that no vigilance on their part has been adequate to protect these institutions from frauds and peculations covered up and concealed by false entries and false reports. A representation by a director that the institution is in a sound and solvent condition within his own knowledge possesses the legal characteristics of the like representation as to the credit and financial ability of a third person, such as was before the court in *Haycraft v. Creasy*, and it must be subject to the same legal rule.

The facts on which this case was founded were these: The plaintiff was a depositor in the bank. About the 1st of August, 1878, there

was a rumor in circulation affecting the condition of the bank. The defendant was one of the directors of the bank and a member of the finance committee. The plaintiff, having heard the rumor, went to the defendant and told him of the rumor in circulation, and that he was a depositor and did not want to lose his money, and proposed to take it out. The defendant said: "It can't be so, unknown to me and Mr. Monks. We are on the finance committee. There can be nothing wrong with that bank unknown to me and Mr. Monks. Don't believe any of these false reports; believe me; take my word for it. The bank is good, paying six per cent—the best in the State. If all that is in Jersey tells you the bank is bad, don't you believe it till I tell you." He also said "there was a surplus of over \$6,000 after the dividends were paid." The bank continued to pay all demands down to November 1st, 1878, when it went into the hands of a receiver. It was insolvent on the 1st of August, 1878, when these representations were alleged to have been made.

The defendant was a director of the bank from June 8, 1869, until its suspension in November, 1878, and a member of the finance committee from November 19, 1877. The duties of the finance committee were to attend to all applications for loans, and to look after the investing of the company's funds. The general charge and government of the bank devolved upon the executive committee, of which the defendant was not a member. There was no evidence that the defendant had actual knowledge of the condition of the bank. On the contrary, the proof was that at a regular meeting of the directors, on the 31st of May, 1877, the president read his statements, showing a surplus of \$6,000, and a motion was adopted declaring a dividend of six per cent. The next regular meeting was on the 19th of November, 1877. It appears by the minutes that a statement of the assets and liabilities was read in detail, and a dividend of six per cent per annum was declared for the six months ending October 31, 1877. On May 30, 1878, another meeting of directors was held, at which the minutes of the last meeting were read and approved, and a dividend at the rate of six per cent, for the six months ending April, 1878, was declared. All these dividends were credited, and were paid to such of the depositors as presented their books. The defendant was present at each of these meetings of the directors.

On these facts, the defendant was not entitled to the nonsuit he asked for; but he was entitled to a different instruction to the jury.

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The case cannot be distinguished from *Haycraft v. Creasy* and *Taylor v. Askton*, and it should have been left to the jury to say whether upon the evidence, the defendant made the representations with a fraudulent purpose to deceive, or whether he made them in good faith and in the honest belief that they were true.

There will be a certificate accordingly.

Ordered accordingly.

 BROCKWAY V. MULLIN.

(46 N. J. Law, 448.)

Agency — to manage hotel — livery stable.

An agent to manage a hotel has no implied power to bind his principal for the safe keeping and return of carriages furnished by a livery-stable keeper for guests of the hotel.*

ACTION for loss of wagon, harness, etc. The head-note and the opinion show the facts. The plaintiff had judgment below.

R. Byington, for plaintiff in *certiorari*.

J. H. Meeker, for defendant.

REED, J. The reason relied upon for the reversal of this judgment which I will first notice is that there is no evidence in the case from which the court could find that the contract set out in the finding of the court was entered into between the plaintiff and Frank S. Brockway. But while the testimony is not very clear, yet there was, in that of the plaintiff detailing the conversation between himself and Frank S. Brockway relative to the furnishing of carriages to the guests of the hotel, from which the deduction might be drawn that such a contract was entered into.

The next reason, and the important reason, is that such a contract, if made, did not bind Mrs Brockway, because it related to a matter which was outside of the agency with which she had invested her husband. The court found that the contract into which

* See *Huntley v. Mathias* (90 N. C. 101), 47 Am. Rep. 516.

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the husband entered with the plaintiff was that he, the husband, as the agent of Mrs. Brockway, would be responsible for the safe keeping of the bailments, and to pay for the use of them.

The authority of the husband was to manage her business of keeping a hotel. She never authorized specially, nor had she knowledge of the arrangement with the plaintiff into which her husband had entered.

To support the case of the plaintiff, which was against the wife as well as the husband, it is necessary to bring the contract of the husband within the scope of the general authority to bind her in matters appertaining to the management of the hotel business. No testimony was delivered upon the trial for the purpose of showing that the business of hotel keeping included supplying teams to guests, or if so, upon what terms.

The court below must have held that it was a matter of judicial knowledge that the contract was made concerning a matter within range of the business in which the wife was engaged. Now the legal liability of a hotel keeper is to furnish lodging and food to guests and their accompanying horses. There is no legal liability to furnish horses or other means of locomotion. I am at a loss to find any ground for holding that this is within the occupation of the wife in this case.

It is said in the brief of plaintiff's counsel that it is a matter of common knowledge that no well-regulated hotel could do business and accommodate the public without making some such arrangement as this, and that it is a well known occurrence for a guest who wishes a horse and carriage to apply at the desk and an order is sent to the livery stable keeper who furnishes the equipment to a man he does not see, and so has no means of ascertaining his responsibility. He therefore says that a contract like the one found by the court is a natural and necessary one for the protection of the livery man. Suppose this be admitted and it be for the purposes of this argument assumed that this is such a familiar transaction that it rests within the cognizance of every one without proof of the fact, yet I do not think it makes in favor of the plaintiff's case. It only shows that the hotel, for the convenience of a guest, communicates with some one who furnishes the carriage. So also the communication is made with an express company or railroad company to take charge of a guest's luggage. So in both instances, the charges are paid at the desk of the hotel for the

guest and put in his bill. In neither is it known that the proprietor of the hotel assumes the character of an expressman or hirer of a vehicle, or any responsibility for the performance of the duties of either. And this usage, as claimed to exist within the knowledge of every one, makes the guest and not the hotel keeper the bailee. If this be so, then if the hiring in this case was, as is claimed, a hiring to the hotel keeper, it was not within the scope of his business, and so did not bind the principal. If it was a hiring to the guest, then the contract of the husband encounters a legal difficulty in the shape of the statute of frauds. It was a verbal contract to answer for the default or miscarriage of another. *Kirkham v. Marter*, 2 Barn. & Ald. 611; Brown Stat. Frauds, § 155. Therefore to recover at all, it was essential for the plaintiff to stand upon a usage for hotel keepers to hire horses to their guests. For it is perceived that if he was the bailee, the letting to the guest was a new bailment in which he was the bailor. If a part of the business of a hotel keeper is to let horses to his guests, and by reason of this the hotel proprietor is bound for a hiring of a horse for that purpose, with a contract extending the liability of the hirer to an absolute insurance, it is difficult to perceive the limit of the agent's authority in this direction. If he can hire, he can purchase. He can establish a stable with an unlimited number of animals, and for their price and food and attendance, the proprietor, although ignorant of the act, will, by reason of the general authority to manage the business of the hotel given to the agent, become responsible. I think, as the case stands upon the record, with no proof that the transaction concerning which this contract was made was incident to the hotel business, and with the fact that the proprietress was ignorant of the transaction, there is nothing to support the agent's authority to bind her by such an agreement. So far as appears, it was neither within the real authority nor the appearance of authority which she had conferred upon him.

Let the judgment, so far as it affects the defendant Josephine E. Brockway, be set aside.

Judgment set aside.

Little v. Dusenberry.

LITTLE V. DUSENBERRY.

(46 N. J. Law, 614.)

Receiver — liability to suit.

The receiver of an insolvent railroad company is liable to an action for the negligence of his agents in operating the road.

ERROR to the Supreme Court. Trespass on the case for death of a railway passenger. The opinion states the point. The plaintiff had judgment below.

John W. Taylor, for plaintiff in error.

H. C. Pitney, for defendant in error.

SCUDDER, J. The first error assigned on the bill of exceptions returned with the writ is that the receiver was not liable to this action because that under his statutory appointment he is not a common carrier, but a public officer.

This statute of February 11, 1874, enacts "that whenever any incorporated railroad company in this State shall become insolvent, and the property of such company shall have passed into the hands of a receiver by order of the chancellor, in accordance with the act to which this is a supplement, the receiver shall, and he is hereby empowered to operate said railroad for the use of the public, subject at all times, to the order of the chancellor; and all expenses incident to the operation of said railroad shall be a first lien on the receipts, to be paid before any other incumbrance whatever." Rev., p. 196, § 106.

It is urged that as he was empowered by the act to operate the railroad for the use of the public, there can be no liability to individuals on his part when executing this public duty. *Freeholders v. Strader*, 18 N. J. L. 108; *Cooley v. Freeholders*, 27 N. J. L. 415; *Livermore v. Freeholders*, 29 N. J. L. 245; 31 N. J. L. 507; *Pray v. Jersey City*, 32 N. J. L. 394; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19-21, are cited in support of this position. The exhaustive view of this disputed principle in *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332, defines its true application in protecting those who are acting under public authority. It agrees with the statement in the con-

clusion of the opinion of the court in *Pray v. Jersey City*, in these words: "The neglects of agents of the public in the discharge of their legitimate functions cannot constitute the basis of an action in behalf of an individual who has sustained a particular damage. Such neglects are public offenses, and must be remedied by indictment." Taking this as the settled law of our State, the first inquiry is, Does the defendant—the receiver of an insolvent railroad company—stand in such position to the public that he can claim its protection?

An examination of the cases where this immunity has been given will show that it is limited to those who are strictly public officers, who are parts of the governmental agency of the State, entirely distinct from individual gain or profit, such as State, county, municipal and township boards and officers, discharging duties imposed on them by law, with none behind them but the public, whom they represent, and no funds to answer for damages except those that must be taken from the public treasury. The phrase in the statute, "to operate said railroad for the use of the public," does not create this public office. It imposes upon the receiver appointed by the chancellor no other duty to the public than that which belongs to every railroad corporation acting under statutory authority. They must operate their railroads for the use of the public, and do so, otherwise they could have no legal right of eminent domain to condemn lands and materials for the construction and maintenance of their roads. The object of the statute is plain, that when a railroad company becomes insolvent, it shall and may be kept in operation for the public convenience of travel and transportation. If its operation should immediately cease when its insolvency is determined, great detriment would follow to those who are dependent on it as a highway open for the use of all who may need it. At the trial in the Circuit, the judge, in charging the jury, said that the statute "was simply designed to secure the running of the road in the interest of the public, by making the running expenses the first lien on the receipts, in priority over incumbrances." This is the obvious meaning, and there was no intention on the part of the legislature to create a new public office, and clothe the receiver who occupied it by the appointment of the court, with the immunities of such office, and thereby enable him to shield himself, cover up the earnings and protect the stockholders and creditors from the damages to others, in operating the road. It has been

the judicial construction of this statute, in our courts, that it does not change the obligation of the receiver, who by the appointment of the chancellor takes upon him the management of the road, and that he is liable, in his representative capacity, in all respects, to others, for injuries, as the company would be, if transacting its business in the usual way.

Klein v. Jewett, 26 N. J. Eq. 474, decided that there was such liability of the receiver, and on appeal to this court, in s. c., 27 N. J. Eq. 550, this point appears to have been abandoned.

Palys v. Jewett, 32 N. J. Eq. 302, was an action against the defendant, as the receiver of the Erie railway, for damages alleged to have been sustained by the plaintiff by reason of the negligence of the employees of the receiver, in the management of a train of cars, and it ruled that a person having a legal cause of action, sounding merely in tort, against the receiver appointed by the Court of Chancery, has a right to pursue his redress by an action of law, with the permission of the chancellor. In the first named case *Meara v. Holbrook*, 20 Ohio St. 137; s. c., 5 Am. Rep. 633; *Blumenthal v. Brainard*, 38 Vt. 402; *Paige v. Smith*, 99 Mass. 395, are cited with approval. In all, receivers are held to their liability as common carriers, for a breach of duty or obligation arising out of business intrusted to them in that relation, and it is no defense at law that they were running and managing the line of railroad as receivers, under the appointment of the Court of Chancery. It is said in *Jones on Railroad Securities*, ¶ 509, that there is much diversity of opinion upon the question whether a receiver is liable for the negligence of his employees in the same manner and to the same extent that a railroad company operating its road is liable. After citing and balancing the cases in the different courts, he concludes that the doctrine of *respondeat superior*, as between a receiver acting under the direction of a Court of Chancery, and his employees, has no application. If this be confined to the principle that a receiver is not personally responsible for injuries suffered by the neglect or misconduct of persons employed by him in performing his duties under the appointment of court, there will probably be no difference of opinion, but if he is not held liable, in his representative capacity, for the negligence of his employees, and in no way responsible for their misconduct, a very serious difficulty is presented, for it thus appears there may be a right where there is no remedy to enforce it. But the author further says: "Consid-

erations of policy may very likely lead to the adoption of the rule that a receiver shall not be allowed to exercise the rights and powers of a common carrier, without also being held subject to a common carrier's duties and liabilities."

Cardot v. Barney, 63 N. Y. 281; s. c., 20 Am. Rep. 533, holds that an assignee or receiver in bankruptcy of an insolvent corporation is not liable to an action for the negligence of employees, unless he assumes to act as a common carrier, other than as an officer of the court, or where personal neglect is imputed to him.

DANFORTH, J., in *Kain v. Smith*, 80 N. Y. 458, 470, remarking on the case of *Cardot v. Barney*, says: "Observe the care with which the facts are eliminated on which it rests; but as if to prevent any misconception, the learned judge confines it to a case where there is an absence of evidence that the operator assumed to act otherwise than as an assignee, or that he held himself out as a carrier of passengers other than as an officer of the court. So limited, there is no danger that any injury will go without compensation. Damages for injury to the person, whether passenger or employee, for loss of goods or otherwise, would be chargeable upon and payable out of the fund in court, the same as other expenses of administration;" and this may be reached, he says, by application to the same tribunal which might itself dispose of the matter by administering justice between the parties or allow the party aggrieved to bring his suit at law for the alleged injury. He cites *Klein v. Jewett* as authority. The case turned on other facts, which it is not necessary to state.

The examination of these cases does not show so great a divergence of authority as has been supposed, for it is not contended in this case, nor has it ever been held in our courts that the fund in the hands of the court, or of the receiver as its officer, can be reached without the leave of the Court of Chancery, or that an action can be brought at law to fix the measure of damages sustained without such leave. After judgment obtained at law, the execution will be stayed by injunction or by motion in the court having control of the process.

Barton v. Barbour, 104 U. S. 126, which discusses this subject very fully, concludes, on the facts there involved, that a court of equity, having in its hands for administration, as trust assets, a railroad or other property, may authorize the receiver to keep it in repair, and manage it in the ordinary way until it can be sold to

Little v. Dusenberry.

the best advantage of all interested therein. But without leave of that court, a court of another State has under the circumstances no jurisdiction to entertain suits against him for causes of action arising in the State wherein he was appointed and where the property is situated, which are based on his negligence or that of his servants in the performance of their duty, in respect to the property. The plea in that case averred that the plaintiff had not obtained leave of the court having custody of the railroad assets, to bring and maintain his suit. It was on demurrer to the plea which admitted that the suit was brought without leave, that the case was considered. If such leave had been obtained before action brought, a different case would have been presented.

Fulow v. Kelly, 108 U. S. 288, in which an action was brought against a receiver of a railroad corporation, to recover damages against him, as common carrier, for injuries suffered by a collision of the car in which the plaintiff was riding, with a freight car standing on a side track, shows that Kelly, the plaintiff, petitioned the court which appointed the receiver, for leave to sue him in another court, to recover for injuries sustained. This was denied and he asked leave to file his complaint against the receiver, in a suit for the foreclosure of a mortgage in which the receiver was appointed. This was granted, and the receiver ordered to make his defense, which was found against him.

It can hardly be said, as the result of an examination of these cases, and many others referred to in them, that it is settled law that a receiver of an insolvent railroad corporation may not be sued at law, where as in this case, he is continuing the business of the company, as a common carrier, for the transportation of passengers and freight for hire, and where the defense is not set up, that the action is brought without leave of the court that appointed him. On the contrary, it appears that with such leave, he may be sued at law, and that it accords with sound principle and reason that a receiver exercising the franchise of a railroad company shall be held amenable, in his official capacity, to the same rules of liability that are applicable to the company while it exercises the same powers of operating the road. *Sprague v. Smith*, 29 Vt. 421. I do not find in the case returned the specific exception taken that leave was not granted to bring the action. If this be so, it will be assumed, after verdict in a court having general common-law jurisdiction, that whatever was necessary to sustain the case stated in the declaration

was proved on the trial, and that such leave was granted. *Stennel v. Hogg*, 1 Wm. Saund. 226; Steph. Pl. *148.

There was no error in the charge to the jury that the receiver, in his representative capacity, was liable for injuries resulting from the transaction of the business of the corporation under his supervision, as such receiver, the same as the corporation which he represented. If a receiver may thus be charged, the remaining exceptions relate to the particular facts of this case, which it is objected, do not show him to be chargeable.

[Omitting these.]

This covers all the assignments of error in the case presented, and the judgment will be affirmed.

For AFFIRMANCE — The CHANCELLOR, CHIEF JUSTICE, DIXON, KNAPP, PARKER, REED, SOUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, PATERSON, WHITAKER.

FOR REVERSAL — NONE.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
OREGON.

PHYSER V. COLE.

(11 Oreg. 39.)

Negotiable instrument — attorney fee.

A stipulation in a note for a reasonable attorney fee in case of proceedings to collect is valid against the maker.*

ACTION on a promissory note. The opinion states the case.
The plaintiff had judgment below.

Weatherford & Blackburn, for respondent.

Flinn & Chamberlain, for appellant.

WATSON, C. J. The promissory note upon which this action was brought was executed March 9, 1882, in this State presumably, and bore ten per cent per annum interest, which was the highest rate allowed by the law then in force. Laws of Oregon, 1880, p. 17. It also contained the following stipulation, upon which the judgment for attorneys' fees appealed from, was rendered. "And in

* See *First Nat. Bk. of Stillwater v. Larsen*, ante, 393.

case suit or action is instituted to collect said note or any portion thereof, to pay such additional sum as the court may adjudge reasonable as attorney's fees in such suit or action." The question here is whether this stipulation was void *per se*. Much diversity as well as conflict of judicial opinion is to be found in the reports of the several States upon this point. As early as 1841, the Supreme Court of Ohio held that such a stipulation was "against public policy and void." *State v. Taylor*, 10 Ohio, 378. Wood, J., delivering the opinion of the court, says: "It must be admitted, if this agreement can be enforced, the statutes of Ohio regulating the rate of interest, whether upon loans by the fund commissioners or in other cases, are at once virtually repealed. The statute passed on March 28, 1837, provides that the fund commissioners, in a certain event, may loan the money to individuals at a rate of interest not exceeding seven per cent. Seven per cent is the maximum of interest the commissioners are authorized to contract for or receive for the forbearance of their loans. They are prohibited from receiving more, in fact, in express terms—that is, as interest. It is said however that the five per centum in this case is, by the agreement of the parties, to be added to the seven per cent, not as interest, but as costs, agreed upon as such, for collection by the parties. Now it seems to be of little consequence in this case what this five per cent may be called, but the inquiry is, what is the thing itself? However it may be designated, it is very clear to us it is a mere shift or device by which twelve per cent is retained as interest upon this loan, and in this view of the case cannot be enforced. This court have decided that under the laws of Ohio but six per cent interest is recoverable, though the parties contract for more or higher rates. But is it such a contract as public policy should execute? What may be supposed as the natural result to the community from the execution of this agreement? It would be the condition of future loans at banks that the borrower should pay the expenses of collection, and perhaps the tax thereon."

This is a clear and strong statement of the objections to the validity of stipulations of this character in interest-bearing contracts. The same doctrine prevails in Kentucky, Michigan and Nebraska, in some of which however it is placed upon the broader ground of such stipulations being opposed to public policy. *Witherspoon v. Musselman*, 14 Bush, 214; s. c., 29 Am. Rep. 404; *Kullock v. Taylor*, 39 Mich. 137; s. c., 33 Am. Rep. 356; *Myer v.*

 Poyser v. Cole.

Hart, 40 Mich. 517; s. c., 29 Am. Rep. 553; *Dow v. Updike*, 11 Neb. 95.

But in Illinois, Indiana, Iowa, Pennsylvania, Tennessee, Texas, and many of the other States, a different view has been taken and the opposite doctrine established. *Clawson v. Munson*, 55 Ill. 394; *Smith v. Silvers*, 32 Ind. 321; *McGill v. Griffin*, 32 Iowa, 445; *McIntyre v. Cagley*, 37 Iowa, 676; *McAllister's Appeal*, 59 Penn. St. 204; *Hulnig v. Drexel*, 7 Watts, 126; *Imler v. Imler*, 94 Penn. St. 373; *Miner v. Paris Ex. Bk.*, 53 Tex. 559; *Parham v. Pulliam*, 5 Colo. 407.

In *Hulnig v. Drexel*, *supra*, the court say: "The contract here has nothing in it oppressive to the borrower; it is advantageous to the borrower and lender when merely intended to enforce a punctual performance of the contract; nor is there the slightest pretense to say that it is intended as a cover to usury. A failure on the part of the borrower puts nothing in the pocket of the lender; on the contrary, the probability is he will not be reimbursed the expenses which he may incur. With such stipulations which are frequently made, persons may borrow money at a less rate of interest, as punctuality is always taken into consideration in fixing the terms of a loan." And in *Parham v. Pulliam*, 5 Colo., similar views are expressed. In this case the court say: "The contract of the debtor to pay the attorney's commissions, in case of suit upon default of payment of the debt for the prescribed time, adds nothing to the amount of interest to be paid to the creditor. If the debtor pays the ten per cent interest stipulated, and also pays the attorney's commissions, the creditor has received no more than the ten per cent interest. If he does not pay the attorney's commissions the creditor receives to that extent less than the ten per cent interest."

The Supreme Court of Indiana thus expresses its unqualified approval of such engagements on the part of the borrower. "A stipulation whereby the debtor agrees to be liable for reasonable attorney's fees in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it." *Smith v. Silvers*, *supra*. As to the consideration for such stipulations, the Supreme Court of Texas, in *Muier v. Paris Exchange Bank*, cited above, say: "If the contract were lawful in other respects, the conditional

stipulation to pay the usual attorney fees, in the event suit had to be instituted to enforce it, would be legal and founded upon a valuable consideration. Such fees, though not an element of damages, in an ordinary suit for the collection of money, can be made such by express contract." Citing *Roberts v. Palmore*, 41 Tex. 617.

Upon the point of the sufficiency of consideration for such a stipulation, we think there can be no doubt. Making the loan itself, although at the highest rate of interest allowed by law, would constitute a valuable and sufficient consideration. And the only question involving any serious difficulty, it seems to us, is whether such engagements are opposed to the policy of the statute against usury. If the effect of enforcing them would be to give the lender a larger compensation for the loan and use of his money than such statute allows, then they should be held usurious and void. But while the lender has no lawful right to contract with the borrower for a rate of interest exceeding the limit imposed by the statute, he is not debarred from requiring as a condition of making the loan that he shall be secured in such a way as will enable him to receive the principal of the loan and the amount of lawful interest stipulated for, without further loss or expense occasioned by the default of the borrower.

As is said by the court in *Imler v. Imler*, 94 Penn. St.: "The contract is one of indemnity, and if the defendant, by his neglect or refusal to pay, has subjected his creditor to the necessity of employing counsel, why should he not pay?" It is no new or additional compensation for the use of money that is provided for by such a stipulation. Such an engagement is not in the nature of a contract for additional interest, but a provision simply against possible future loss or damage of a certain and definite character, which can only result as a consequence of the neglect or default of the borrower, and against which there seems no good reason why he should not be held competent to indemnify. The lender only charges the rates of interest allowed by law upon his contract with the borrower for interest, but on account of the breach of a further stipulation, not forming any part of said contract but founded on a valuable consideration, he claims such damages as he may sustain by being compelled to retain counsel to institute judicial proceedings to collect his debt. In legal contemplation it is possible for the borrower to avoid making default in payment and competent for him to indemnify the lender against any special damages it may

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occasion. Such is the view expressed in *Minor v. Paris Exchange Bank*, 53 Tex., 559, and in our judgment it commands the assent of sound reason. There is nothing peculiar in the particular provisions or general policy of our laws which render this latter class of decisions inapplicable to the determination of the case at bar. On the other hand such stipulations in contracts for the loan of money in this State are not only frequent but practically universal. In the several courts of first instance their validity has generally been recognized and relief founded upon them awarded in proper cases. In the Federal court for the district of Oregon their validity has been expressly adjudged. *Wilson S. M. Co. v. Moreno*, 6 Sawyer, 35; *Bank of British North America v. Ellis*, 6 Sawyer, 96.

In the presence of this state of things the law-making power has remained silent, and its tacit approval may not unreasonably be inferred. We should hesitate, while a reasonable doubt remained, to overturn an existing order of things so important in its relations to the business interests of the country and so well established in the thoughts and habits of the business public. But while it would hardly be deemed accurate to say that the question has yet been settled either way by a controlling weight of authority, it can hardly be controverted that the current of adjudication is in favor of the validity of such engagements, subject to the general supervisory power of the courts as to their *bona fides* and reasonableness. Whether a specified amount or per cent, or only "reasonable fees" is provided for by the stipulation, we have no doubt of either the power or duty of the court where the question as to good faith or reasonableness is presented, upon issues properly framed, to pass upon and determine it, as it should any other issue in the case. If found to be a mere pretext for the concealment of usury, or to be unreasonable in amount, the remedy is with the court. In this case the complaint alleged that the sum of forty dollars, for which the judgment appealed from was rendered, was a reasonable attorney's fee for instituting the action, etc. No answer was filed, and consequently this allegation must have been taken as admitted. The only question raised by the demurrer and motion to strike out was whether such stipulation should be deemed void *per se*. We hold that it was not, and therefore the judgment should be affirmed with costs to respondent.

Judgment affirmed.

LORD, J., concurring.

TRUTCH V. BUNNELL.

(11 Oreg. 58.)

Statute — construction — "mortgage"

A statute authorizing a court to order the renting, sale, or other disposal of the real and personal property of minors, does not empower such court to authorize a guardian to mortgage his ward's real estate.*

FORECLOSURE. The opinion states the case. The plaintiff had judgment below.

E. W. Bingham and A. C. Gibbs, for appellants.

Northrup and Gilbert, for respondent.

WALDO, J. This is a suit to foreclose a mortgage of the north half of block eight in the city of Portland. The property belonged to minors, and was mortgaged by their guardian, acting under the order of the County Court of Multnomah county, to secure the payment of a promissory note for \$12,000, dated December 1, 1873. Said note was signed "D. D. Bunnell, guardian of Mezaldus Scott, Fred Scott, Melvern Scott, Oceana Scott and Robert Scott, minors and wards of said guardian."

The same mortgage was before this court in *Trutch v. Bunnell*, 5 Oreg. 504. It is now conceded that there was no adjudication in that case because of jurisdictional defects in the proceedings. This suit was therefore brought to foreclose the same mortgage. In order to maintain the suit it is necessary for counsel for respondent to concede that the former proceedings were *coram non judice*. Yet they rely on the opinion delivered in that case as a judicial exposition of the law by this court, and as a precedent to be followed in the decision now to be made. Counsel say in their brief: "The force of that decision (*Trutch v. Bunnell*) is not broken by the fact that the parties to the present suit have admitted that in the former suit the court had no jurisdiction of the parties defendant. It remains the decision of the Supreme Court. It has not been set aside nor adjudged illegal or void. It is a precedent just as binding and entitled to the same respect as any other decision of this court."

* See *Faulk v. Dashiels*, post, 542.)

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Counsel for the appellants were unable to see how a decree so called should be void as a decree and yet conclusive on the matter attempted to be adjudicated, as a precedent. It certainly seems clear that as now presented the opinion cannot be regarded in any other light than as an extra-judicial opinion. There can be no precedent without a decision; and according to the principles of the common law, an opinion on a matter not in judgment before the court is not a decision. CURTIS, J., *Carroll v. Carroll*, 16 How. 287. Judicial power is vested in courts, not in the officers thereof. Judge O. C. Pratt's Opinion on the Location Law, app. to Council Journal, 3d session, Oregon Territory; 12 Ind. 583.

In *Brumley v. State*, 20 Ark. 78, it is said: "In the case at bar the judge under the circumstances was clothed with no judicial authority to sit in judgment upon the rights of appellant — there was no court, and consequently, no judgment." Where the court has no right to decide at all, for want of jurisdiction, there is no judgment. MARSHALL in argument, *Pickett v. Morris*, 2 W. Va. 271 "If *coram non judice*, the sentence is as if not pronounced." MARSHALL, C. J., *Rose v. Himley*, 4 Cr. S. C. 278.

Whatever, says Hobart, a jury "do try besides the issues, is *per non juratos*, as a case judged by the court that hath no jurisdiction of the cause; *coram non judice* and utterly void." Hob. 53. "Where there is no jurisdiction at all there is no judge, the proceedings is as nothing." *Perkin v. Proctor*, 2 Wells. 386.

It follows that a court without jurisdiction cannot render a decision, and consequently, cannot make a precedent. We must decide the question before us as one which has received no judicial exposition in this State. We have no right to follow the extra judicial construction in 5 Oreg. 504, against our own convictions. To do so would be plainly to deprive the appellants of their property contrary to the law of the land.

The authority of the guardian to execute the note and mortgage was founded on an order of the county court of Multnomah county. The power of the court to make such order is supposed to have been conferred by sub. 6 of § 869, General Laws of Oregon, 1874, p. 283, which provides that the county court, as a court of probate, has power "to order the renting, sale or other disposal of the real and personal property of minors." Let it be conceded that without further legislation, plenary power is conferred on the County Court by this subdivision to order the sale or other disposal of the real or

personal property of minors. The position counsel for respondent then take is that the powers conferred are broad enough to authorize the court to order the execution of a mortgage to secure money borrowed by the guardian of minors and invested in buildings to rent erected on their real estate. That is the proposition of counsel as stated to meet the facts in this case. It is unnecessary to enter into the case beyond this proposition, for the case is met at the outset with a fatal objection. The power generally to sell or dispose of the real and personal property of minors, whether conferred by a testator by will, or upon a court by a public statute, confers no power to mortgage. The weight of modern authority for this position is decisive. The construction put on language like this in a private instrument cannot be more stringent than that put on a statute in derogation of the common law, giving power to divest infants of their inheritance. The power to mortgage must be plainly and unequivocally conferred. If not conferred in special words, it must be necessarily implied in powers actually conferred.

Now it is a fundamental principle in the law of powers that the donor of the power can exercise it only to the extent actually conferred, and as conferred. Thus in *Hoyt v. Jacques*, 129 Mass. 287, it was held that a power in a will to sell real estate, if necessary for the maintenance of the devisee, did not authorize the devisee to mortgage the estate for his maintenance. The same principle was laid down in very strong terms in *Ferry v. Laible*, 31 N. J. Eq. 566.

In a note to the case, *Page v. Cooper*, 16 Beav. 396, is cited, where it was held that a power to sell and dispose of real estate and out of the proceeds "to levy, raise and pay" two sums, and to invest the residue, did not authorize a mortgage.

In *Stokes v. Payne*, 58 Miss. 614; s. c., 38 Am. Rep. 340, a power in a will to "sell and dispose" of real property when it appeared advisable to do so for the education and support of children, was held not to warrant a mortgage. In *Albany Ins. Co. v. Bay*, 4 N. Y. 26, it was laid down that a devise to trustees to sell and dispose of real estate in fee simple or otherwise as T. should direct, did not empower the trustees to mortgage.

The power to mortgage, as a mortgage is construed in this State, is incidental to another power — the power to borrow money. Before these can be a power to mortgage there must be a power back of the mortgage to contract the debt which the mortgage is given to secure. A power to give a mortgage to secure the payment of

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money without a power to borrow the money is a contradiction. Now a promissory note simply given by a guardian, with or without the authority of the County Court, for money borrowed and invested for the benefit of the ward, is certainly void. How surprising then that a contract by which money was borrowed should be a nullity, while a mortgage given to secure the performance of this void contract, should be entirely valid. Or that a promissory note should be void unless a mortgage should be given to secure its payment. Counsel have thrown no light on this difficulty.

That the power to sell, generally, will not authorize a mortgage, is conclusively settled in this country by late adjudications. Nor can the power to order the "other disposal" of the real estate, be construed into a power to mortgage. This word disposal has no technical meaning. But we know that it must receive a strict construction, and that its sense must be determined by the context. In this connection the maxim *noscitur a sociis* applies. The disposal must be of the same character as a sale—that is, a transfer of the estate. But in this State a mortgage is not a conditional sale, and therefore transfers no estate. A mortgage of real estate creates a power which may lead to a disposal, but is not itself a disposal of real estate. The American theory of mortgages and securities, and not estates, makes what we term foreclosure proceedings really collection proceedings. *Fitzhugh v. Maxwell*, 34 Mich. 144. A disposal is affected by a foreclosure and sale, but a County Court has no power to order a foreclosure and sale. A foreclosure in the Circuit Court is not a disposal by order of the County Court.

The power to dispose implies and requires a disposal for full value. It might, possibly, authorize an exchange. *Phelps v. Harris*, 101 U. S. 380. But if a mortgage can be made, the estate becomes liable to a forced sale. Thus in *Hoyt v. Jacques*, above, the court say, "the two transactions of a sale and a mortgage are essentially different. A power to sell implies that the attorney is to receive for the benefit of the principal a fair and adequate price for the land; a power to mortgage involves a right in the attorney to convey land for a less sum, so that the whole of the estate may be taken on a foreclosure for a part of its value." This argument is quite applicable under our statute, for property is quite liable when sold at a forced sale to be taken for a part of its value.

A writer in the Canadian Law Times, vol. 1, p. 77, says: "The maxim *omne majus continet in se minus* is also sometimes quoted

in support of the power to mortgage, a maxim, the truth of which as a mathematical principle is indisputable, but which as a proposition of law must not be too much relied upon. * * * We may say of this as has been said of another frequently quoted maxim, the maxim can never be applied until the law is ascertained, and when it is, the maxim is superfluous." So in *Costant v. Servoss*, 3 Barb., "a mortgage is now considered as a mere pledge or security for money. It is not a sale nor any part of it. It is not even a conditional sale, for that imports that the title would vest on the happening of the conditions. That is not so in the case of a mortgage. There no title vests until a subsequent sale is actually made," In this last case a conveyance to John Pintard "in trust for his two infant grandsons, John Pintard Servoss and Elias Boudinet Servoss, with power to the grantee to grant, bargain, sell, and convey those lots, or any part thereof, for such sum or sums, and at such times as to him should seem proper, and to make and execute all necessary conveyances in the law for the same for the benefit of said infants," was held not to confer a power to execute a mortgage.

It follows that the power to mortgage cannot be deduced from the statute either from the word sale or from the word disposal. A power to mortgage is neither necessarily implied in the word disposal, nor does its association with the word sale indicate that any such interpretation can be legitimately put upon it. The silence of the statute as to mortgaging, when treating of the powers and duties of guardians, can receive but one interpretation — that no such power was supposed to have been conferred. The failure to make provision for the important subject of mortgages on the real property of infants, if not conclusive of the want of such power as contended by counsel for appellants, is entitled to considerable consideration as showing the intent of the legislature and probable meaning of the statute.

Counsel for the respondent cited the text of Barbour's Ch. Prac. 218, and Hoffman's Ch. Prac. The text of Barbour referring to the section of the Revised Statutes that any infant seised of any real estate, or entitled to any term for years in any lands may by his next friend or guardian apply to the Court of Chancery for the sale or disposition of his property, and to another provision of the statutes for the sale of the real property of minors, says: "These provisions have always been construed as conferring upon the court the power to direct the real estate of infants to be mortgaged."

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Now the doctrine of the text seems at one time to have been the doctrine of the courts of chancery. A mortgage was held to be a conditional sale, and a power to sell was therefore held to imply a power to mortgage. This construction was announced in 1724, in *Mills v. Banks*, 3 P. Wms. 1, where counsel had argued that the words selling implied mortgaging, and the court in an *obiter dictum* said, "a power to sell implies a power to mortgage, which is a conditional sale." This doctrine thus broadly laid down is no longer law in England. See *Ferry v. Laible*, 31 N. J. Eq. 574; Canadian Law Times, 1, 23. It was long ago denied as a general rule in New York, and the case of *Williams v. Woodward*, 2 Wend. 492, in which *Mills v. Banks* was cited with approval, was overruled in *Bloumer v. Waldron*, 3 Hill, 361. See note to *Williams v. Woodward* 3 Wend. and *Coutant v. Servoss*, 3 Barb. 141.

When a mortgage ceased to be looked on as a conditional sale, it no longer became possible to derive a power to mortgage from a power to sell. Thus the Canadian Law Times, above cited, says: "There is one general ground on which the American authorities are distinguishable from the English, which is, that the American courts look upon a mortgage, not as a conditional sale, but as a mere lien upon the land which it covers, the legal fee in which lands never passes out of the mortgagor. An American mortgage is therefore not such a compliance with a power to sell that it could be maintained even at common law.

When our statute was enacted, the principles of construction announced by Barbour and Hoffman had ceased to be law. The theory of mortgages that prevailed had altogether overthrown the doctrine of their texts, admitting it to be a correct statement of the law when written, and conceding in its application to this case that the County Court is to be viewed as a court of chancery. It becomes unnecessary to refer to other points learnedly discussed in the arguments of counsel. The settlement of accounts will be left to be settled in the court below, as also the question of reimbursement for improvements. The decree must be reversed and possession of the property awarded to the appellants.

Decree reversed.

MUMFORD V. SEWALL.

(11 Oreg. 67.)

Taxation — mortgages — place — impairing contract.

Mortgages of non-residents may be taxed where recorded without regard to the time of the execution of the contract.

MANDAMUS. The opinion states the case.

Dolph & Simon, for appellant.

M. F. Mulkey and *Henry McGinn*, for respondent.

WALDO, J. The act of October 26, 1882, entitled "An act to define the terms 'land' and 'real property' for the purpose of taxation and to provide where the same shall be assessed and taxed, and to declare what instruments whereby land or real property is made security for the payment of a debt shall be void, and to repeal sections 2 and 7 of chapter 50 of the miscellaneous laws of Oregon," provided that a mortgage of real property should, for the purposes of taxation, be deemed to be real property, and should be assessed and taxed to the owner thereof in the county where recorded. Section 7 of the act made it the duty of the county clerk, when requested by the owner of a mortgage recorded in his office, to record in the margin of the record of the mortgage all payments made on the indebtedness which such mortgage was given to secure. The respondent, in pursuance of such act, requested the appellant, the county clerk of Multnomah county, to record, in the margin of the record of a certain mortgage recorded in his office, certain payments made thereon. The appellant refused to make the record. The respondent thereupon applied to the Circuit Court of Multnomah county for compulsory process, which resulted in a peremptory writ of mandamus requiring said clerk to make such record. The appellant brings the case here where he assails the act as impairing the obligation of contracts and unconstitutional, in so far as it attempts to tax mortgages held by non-residents, the respondent having averred in her petition that she was a resident and citizen of the State of New York.

Mumford v. Sewall.

All subjects, things as well as persons, over which the power of the State extends, may be taxed. "The sovereignty of the State extends to every thing which exists by its own authority or is introduced by its permission." MARSHALL, C. J., *McCullough v. Bank of Maryland*, 4 Wheat. 429. The act of October 26, 1882, taxes mortgages as such as well as mortgage debts. See *People v. Wharfenby*, 38 Cal. 461. But the power to tax the debt is not involved in the question submitted, and sufficient to the day is the evil thereof. A mortgage, as such, is incorporeal property. It may be the subject of taxation; for "the objects and sources of taxation are, in general, bounded only by the jurisdiction or territorial limits of the State, and extend to and embrace all privileges, rights, property, or franchises not exempted in the organic law." SNEED, J., *Harrison v. Willis*, 7 Heisk. 41. Concede that the debt accompanies the respondent's person and is without the jurisdiction of the State. But the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon absolutely as the land which it binds. Cases like *Arapahoe v. Cutter*, 3 Col. 349, and *Davenport v. Railroad Co.*, 12 Iowa, 539, 547, involved questions of legislative intent—of construction, not of power. But in the act before us there is no question as to the legislative intent. The question is wholly one of power, and since the power of the State over the mortgage is as exclusive and complete as over the land mortgaged, the mortgage is subject to taxation by the State, unless there is constitutional limitation to the contrary.

We have seen that the mortgage contract is governed solely by the laws of Oregon, no matter where the parties to it may reside. If therefore an act taxing mortgages impairs the obligation of contracts, it impairs such obligation in every case of mortgage, irrespective of the residence of the parties to it. In considering this part of the case therefore, the question of residence or citizenship cannot figure. It has already been shown that the State has the power abstractly, to tax mortgages, as such. It follows that the only ground on which it can be claimed that the act of October 26, 1882, impairs the obligation of the mortgage contract is that the act was passed after the contract was made. But the law simply taxes property created by the contract. The State has the power to tax property exempt from taxation at the time it was acquired. A tax on a new subject or an increased tax on an old one

does not impair the obligation of contracts. *North Missouri Railroad Co. v. Maguire*, 20 Wall. 61; 49 Mo. 499, and authorities cited. Hence, the fact that the mortgage was not subject to a tax at the time it was made does not deprive the State of the power to tax it by a subsequent act. The State has done nothing more than to tax property which was exempt from taxation before the passage of the act. The objection that the law impairs the obligation of contracts is altogether unfounded.

Counsel for the appellant cite the case of the *State Tax on Foreign Held Bonds*, 15 Wall. 300. If the question presented in this case was the power of the State to tax the mortgage debt it would be difficult, on principle, to distinguish that case from the present, for the petition of the respondent alleges that the debt was payable in New York. That question, as has been said, does not now distinctly arise. It may be observed however of that case that we feel less hesitation in expressing some difficulty in fully appreciating the grounds on which it rests, since a very strong minority of the court were of a contrary opinion. There is some obscurity in the application of principles, such as were announced in *Baldwin v. Hale*, 1 Wall. 223, and like cases, to the case then in hand. It does not clearly appear that the law of Pennsylvania had an extra-territorial operation on contract obligations in New York. There is some ground to say that it operated on them in Pennsylvania as they actually existed there. When the citizen of New York loaned his money in Pennsylvania, and took the obligation of one of its citizens for its payment, the laws of Pennsylvania immediately gave him a right to enforce this obligation. They protected the right without which the obligation would be valueless, and this right was property. *Harrison v. Willis*, 7 Heisk. 44.

In *Duer v. Small*, 4 Blatchf. 265, it is said: "The owner of property within the limits of a State, no matter whether the property be real or personal, and no matter where the owner has his domicile, has a right to call upon the government of the State to protect such property by its laws, and by its officers acting under such laws. But such protection cannot be afforded unless means, by the way of taxes, are furnished to afford the protection. * * * If a non-resident does not wish to pay for such security and protection he can withdraw his personal property from the State and thus free himself from such payment. There is no law which compels him to put his property under the protection of the laws of a State of

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which he is not a citizen or resident. But while he asks and demands protection from the laws there is no good reason why he should not pay for it—no good reason why he should demand that the property of the resident should pay for it.”

Some of us have considerable doubt whether the bill is not properly a bill for raising revenue, and therefore in violation of section 18 of article 4 of the State Constitution, because it originated in the senate. But it is not sufficiently clear that a law, which merely declares that certain property theretofore exempt from taxation shall thereafter be subject to taxation, is strictly a law for raising revenue. We do not feel warranted therefore as at present advised, in declaring the law unconstitutional on this ground.

The senate journals do not show that the bill was read on three several days, or that such reading was dispensed with, as required by section 19 of article 4 of the Constitution. But the original bill on file in the office of the secretary of State shows that the bill was read as required by the Constitution. *People v. Commissioners of New York*, 54 N. Y. 276; *People v. Mahaney*, 13 Mich. 481; *Berry v. Railroad Co.*, 41 Md. 446.

Judgment affirmed.

HARRINGTON V. WATSON.

(11 Oreg. 148.)

Landlord and tenant — lease of upper story — destruction by fire.

In the case of the lease of a single room in a building, the destruction of the building by fire releases the tenant from his obligation to pay rent. (*See note, p. 469.*)

FORCIBLE entry and detainer. The opinion states the case. The plaintiff had judgment below.

E. D. Shattuck and *R. D. McKee*, for appellant.

John M. Gearin, for respondent.

LORD, J. This was an action of forcible entry and detainer. It is brought to this court by an appeal from the judgment of the

Circuit Court for Multnomah county, affirming the judgment of the justice's court for Morrison precinct, and giving judgment in favor of plaintiff for restitution of the premises described in the complaint, and for the sum of \$1,820 for the use and occupation of the same. Briefly, the cause of action arose out of this state of facts: The plaintiff is the owner of lot 8 in block 15 of the city of Portland, upon which had been erected a wooden building containing several rooms. On the 2d day of December, 1878, the plaintiff leased to the defendant one of the rooms in said building for a term of five years for a certain monthly rent, payable in advance, and the defendant, by virtue thereof, entered into possession of said room and remained in the quiet and peaceable possession of the same until the 25th day of September, 1882, when the building, including said room, was totally destroyed by fire. On the 25th day of September, 1882, without the knowledge of plaintiff, the defendant moved upon said premises another wooden building, and occupied the same, and on the 1st day of November, 1882, the plaintiff served a written notice upon the defendant to quit, and also demanded possession of the premises, which the defendant refused to deliver up or any portion thereof. Upon this state of facts, the defendant brought an action of forcible entry and detainer, alleging among other things, "that on the 28th day of September, 1882, the defendant unlawfully and by force took possession of said property, and ever since said time has maintained, and does now maintain possession of said premises unlawfully and by force," all of which the defendant, by his answer, denied, and set up the lease as a defense of his action.

Upon issue being joined the cause was tried, by agreement of the parties, without the intervention of a jury, with the results as above stated. The findings of fact by the court will be referred to hereafter, so far as the same may be necessary to the decision of this case. The first question presented for our consideration is, did the total destruction of the building in which was situated the room occupied by the defendant, terminate the lease? The particular language of the lease, out of which this contention arises, is as follows: "That in consideration of the covenants herein contained on the part of the said Thomas Watson, to be kept and performed, I, the said D. F. Harrington, do hereby lease, demise, and let unto the said Thomas Watson the following property, situated in the

city of Portland, county of Multnomah, State of Oregon, to-wit : The room on the corner of North First and F streets, having sixteen feet frontage on North First street, and fifty feet deep on F street, and located in the one-story building now erecting on lot 8 in block No. 15, on the corner of said North First and F streets, the same being in Couch's addition," etc. Whatever hardships it may involve, the doctrine of the common law undoubtedly is, that whenever lands and buildings are leased, and the tenant expressly agrees and covenants, without limitation, or qualification, to pay rent for a certain term of years, he is not released from that obligation by the destruction of the buildings leased, by accidental fire.

In *Hallet v. Wylie*, 3 Johns. 44, the court say : "We think it may be safely said, there is not a case in the books, where the destruction of the demised premises has been held to excuse the tenant from the payment of the rent, on an express covenant ; but in every case where a defense on that ground has been attempted, it has failed." And later, in *Gates v. Green*, 4 Paige, 355, Chancellor WALWORTH said that "it must now be considered settled, both in England and in this State, that a lessee of premises which are burned has no relief against an express covenant to pay the rent, either at law or in equity, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild." 3 Kent Com. 446 ; Wood Landlord and Tenant, p. 814, note. The authorities however indicate that there is an exception to this rule ; that the destruction of the building does not discharge the liability of the tenant for rent, where the lease is of an upper story or basement or apartment in a building, because in such case, the courts say, it is not the intention of the lease to grant any interest in the land further than is necessary for the enjoyment of the rooms so demised, and when these are destroyed, there is nothing upon which the demise can operate, and the lease terminates with the estate. *McMillen v. Solomon*, 42 Ala. 356 ; *Austin v. Field*, 7 Abb. Pr. 34 ; *Graves v. Berdan*, 26 N. Y. 498 ; 29 Barb. 100 ; *Kerr v. Merchants' Exchange*, 3 Edw. Ch. 316 ; *Winters v. Cornish*, 5 Ohio, 477 ; *Womack v. McQuarry*, 28 Ind. 103 ; *Stockwell v. Hunter*, 11 Metc. 448 ; *Ainsworth v. Ritt*, 38 Cal. 89 ; *Shawmut National Bank v. Boston*, 118 Mass. 128 ; *Whitaker v. Hawley*, 25 Kans. 674 ; s. c., 37 Am. Rep. 277.

Our first inquiry, then, must be to ascertain whether it was the intention of the parties, to be gathered from the whole lease, to

grant to the lessee any estate in the land. Now what is the principal thing granted, demised, and for the enjoyment for which the defendant has covenanted to pay rent? The language of the lease is, "the room on the corner of North First street, etc., and located in the one story building now erecting on lot 8 in block 15," etc. It is clear that it is not the whole building, or house, but only a certain room located in that building, which is the principal thing demised or rented, and for which a description was necessary to identify it and distinguish it from other rooms in the building not intended to be demised to the defendant. A lease of lot 8 in block 15 would carry the land and buildings upon it, and so, too, would a lease of the house or building carry, at least, the adjacent soil, for "by a grant of a house, the ground whereon it doth stand doth pass." Sheppard's Touchstone, 90. But the lease is not of the house or building, but of a particular room in the building, viz., "the room on the corner," etc.

There is a distinction between a house and the rooms within it. In *Kerr v. Merchants' Exchange*, *supra*, the vice-chancellor said: "So in the present case, the leases are not to be considered leases of land, but of apartments in the building, distinct from the land on which it was erected. Leases must be construed according to the intention of the parties, and with reference to the subject-matter, which in this instance were rooms or apartments in the building designated by certain numbers. I think it follows, that with the destruction of the premises which were demised, namely, the apartments in the building, the lease itself, and the rights and interests under it, terminated." So, too, in *Stockwell v. Hunter*, *supra*, the court say: "The proper construction of such a lease as the present, as seems to us, is, that the lessee's right of occupation of the land is an interest, for the time being; defeasible by the destruction of the building by fire."

So, also, in *McMillan v. Solomon*, *supra*, it was decided that by the lease of apartments in a building, in a town, for the purposes of trade, the lessee takes only such interest in the subjacent land as is dependent upon the enjoyment of the apartment needed and necessary thereto; and if they are totally destroyed by fire, this interest ceases. By the lease in question, the defendant took no interest in the subjacent soil, or lot 8, beyond that connected with the enjoyment of the particular room demised or rented. It, "the room on the corner," etc., was the thing leased; and when the prin-

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cipal thing leased was destroyed, the lessee's interest therein necessarily terminated.

The fire dissolved the relation of landlord and tenant, for there was nothing left to hold in tenancy. The thing rented was gone, destroyed by fire, and as a consequence, the lease terminated.

[Omitting a minor consideration.]

We hold, therefore, upon the facts of this record, that the action cannot be maintained. The judgment of the court below, including the judgment for \$1,820 for use and occupation, is reversed and the action dismissed.

Judgment reversed.

NOTE BY THE REPORTER.—*Stackwell v. Hunter*, cited in the principal case, is the foundation of *Graves v. Berdan*, *Ainsworth v. Ritt*, and *McMillan v. Solomon*, also cited.

In *Winton v. Cornish*, 5 Ohio, 477, the court said: The owner "can grant the right to take all the minerals underneath, or those twenty feet below the surface only; to dig all the turf; to inhabit a cave, if there is one; to occupy a room in the third story, to occupy the second story, a room in the first story or the cellar, or a part of the cellar. By such grants the land does not pass. When the mineral or the turf is exhausted, the grantee has no right even to enter the premises. When the cave is destroyed by a convulsion or otherwise, there is nothing that is granted remaining. It is so of the rooms or cellar of a house. The lessees of a middle story of a house are limited above and below as well as on the sides, yet the land is as necessary to sustain their part of the house as that below. * * * By the granting of the cellar the whole profits of the land underneath are not parted with, nor by the granting of any one or two rooms when they are overhung by others. * * * Whole rows of two, three and four story buildings, in the most important parts of a city, are sometimes at once destroyed by fire. Can the lessees of cellars, holding by leases such as this, cover themselves in their cellars, and prevent the entry of their landlords to reconstruct the houses? Can the lessees of basement stories of public buildings, with leases such as this, when the edifices are destroyed by fire, roof the basement story and prevent the agents of the public from entering to reconstruct the edifice?"

In *Graves v. Berdan*, 26 N. Y. 496, after laying down the doctrine to which the case is cited in the principal case, the court continued: "But even if the lessee's interest in the demised premises, in a case like this, was not terminated by the total destruction of the building, it may be doubted whether the lessee could recover rent so long as he failed to give to the demised upper rooms the support necessary to them for special enjoyment. * * * In a lease of upper rooms by the owner of the entire building, a covenant should be implied on the part of the lessor to give such support to the upper rooms as is necessary for their beneficial enjoyment." WRIGHT and DAVIS, JJ., dissented, saying: "Can it therefore make any difference that the land is leased in dis-

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ting portions to several instead of but one tenant, or because it may become physically impossible for each of the tenants to rebuild or reconstruct his portion of the demised premises, he is exonerated from his covenant to pay the rent? I think not."

In *McMillan v. Solomon*, 42 Ala. 856, the court said: "A house and apartments within it are not the same. House may include the subjacent land, but apartments within it may not. * * * The lease of the rooms of a house, by the force and meaning of the word, does not carry any distinguishable interest in the land, and there is no principle, and certainly not a preponderance of decisions, giving to it that effect." Citing *Doe v. Burt*, 1 T. R. 701, holding that the lease of a yard does not include a cellar and wine vaults beneath; also *Winston v. Cornish*, *Kerr v. Merchants Ex. Co.*, *Graves v. Berdan*, *Stockwell v. Hunter*, and *Alexander v. Dorsey*, 12 Ga. ; and concluding: "The thing rented is gone. There is nothing which is leased or held in tenancy. There can no longer be a landlord and tenant. The landlord does not warrant that the premises shall be in any particular condition, but he does warrant that they shall exist."

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(11 Oreg. 173.)

Evidence — expert — experiments with gun.

On a murder trial, evidence of experiments on targets by non-professional witnesses is incompetent to show that the deceased was killed by the close discharge of a gun.*

CONVICTION of murder. The opinion states the case.

R. Williams, B. F. Dowell and J. R. Neil, for appellant.

P. P. Prim, for respondent.

LORD, J. The appellant was indicted by the grand jury of Jackson county for the crime of murder in the first degree, committed by shooting and killing William Justus, his father; for which he was tried at the June term of the Circuit Court of that county, and found guilty as charged, and sentenced to be hanged. From that judgment he brings his appeal to this court.

* See *Hart v. State* (15 Tex. Ct. App. 203), 42 Am. Rep. 188, and note, 191; *White v. Milwaukee City Ry. Co.*, ante; *Indiana Car Co. v. Parker*, 100 Ind. 181.

[Minor question omitted.]

The next assignment of error is the overruling the objection of the appellant to the admission of certain pasteboard targets as evidence. It appears by the bill of exceptions that one James Birdseye, by direction of the coroner, and in the presence of the coroner's jury, made several experiments with the gun, with which the defendant claimed he had accidentally killed his father, by discharging it at certain targets made out of pasteboard, at different distances, respectively marked upon them. The coroner, Mr. Huffer, being on the witness stand, the prosecuting attorney, in the presence of the jury, exhibited to him these targets, to the admission of which the objection was made, which he identified, and further testified as follows: That "he saw the defendant's gun tested at different distances, and that the distances were marked respectively on the targets; that he saw the gun loaded when the experiments were made; that the loads of powder were a charger full, and that the charger was the one on the pouch used by the defendant." Birdseye, who had loaded and fired the gun, testified: "I loaded the gun, using the powder flask which the defendant said he loaded from when he killed his father. I filled the charger level full each time I loaded the gun. The distances on the targets are all correct." At the coroner's jury, the defendant had testified among other things that he had taken the gun at the suggestion of his father, and had gone out and shot a squirrel the dogs had treed. He says: "I started from the front porch to put the gun away; I came in near the door or through it to put the gun away; we generally keep the gun sitting behind the partition door on a stand table. I was in here and had just started in, the gun being cocked. If I remember rightly, I had the gun lying across my left arm and I started across the floor to put it away, it being cocked. I went to let the hammer down. I don't know whether or not I had hold of the hammer. I went to let the hammer down and touched the trigger I suppose before I got hold of the hammer, and the gun went off. I was about six feet from the door when the gun went off, that is, I think that was the distance. I suppose it is about the same distance to where my father was sitting in the chair when the gun went off."

With this explanation we now come to the pasteboard targets which were admitted in evidence against the objection of the defendant. Their object was to rebut the defense of accidental killing by showing that the statements of the prisoner upon which

this defense was based were inconsistent with what it was claimed the inferences from the target experiments would prove to be the circumstances of the case. As no one was present, except the prisoner, when the deceased was killed, and as his statements were inconsistent with the theory of a "near" gunshot wound which the prosecution claimed was the cause of the death, the object of the experiments, made on the pasteboard targets which were offered in evidence, was to prove by inference that the deceased came to his death by a near gunshot wound in the hands of the defendant. This was the vital question involved in the issue, and to which the evidence excepted to was directed. But here it must be noted that the witnesses who made these experiments were not experts, and were therefore unable to express an opinion whether the phenomena indicated by near gunshot wounds upon the human body corresponded in appearance with the phenomena exhibited as the result of their experiments, thereby connecting the similarity of the fact offered to be proved with the fact in issue; but it was proposed to show only the phenomena produced by near gunshots on the pasteboard targets, from which it was claimed the jury were qualified and authorized to infer similar phenomena would be produced by near gunshot wounds on the human body, and which as a result of such inferences, would serve to illustrate the gunshot wound from which the deceased died, and thereby establish the point in issue that the deceased was killed by a near gunshot wound. Is the evidence of such experiments admissible for the purposes claimed? Gunshot wounds belong to a branch of medical science, and often give rise to many questions of a difficult nature, although generally a gunshot wound is easily distinguished. And among the questions frequently arising is, was the ball fired near the deceased, or from the distance? Observation and study however in this department of science have noted and described with much exactness the appearance and character of gunshot wounds. In "near" wounds, as they are termed, when the muzzle is placed near the surface of the body of the deceased, when fired, the characteristics of the wound are thus described: 1. A superficial bluish color of the skin from the contusion caused by the explosion. 2. Particles of charcoal and ignited powder imbedded in the skin. 3. Slight burning. 4. Coagulation of blood mixed with powder on the lips of the wound. If the muzzle is placed in direct contact when exploded, the wound is large and circular, the skin de-

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nuded, blackened and burned, and the point at which the ball entered is livid and depressed. Dean's Med. Juris. 241; Wharton & Stille's Med. Juris. 707; Taylor's Med. Juris. 329; Beck's Med. Juris.

Now it must be manifest that there are here noted so many marked characteristics of near gunshot wounds which could by no possibility be reproduced, or represented by experiments upon pasteboard, yet upon which the fact of a near wound is made to depend, and often to be determined, that it would be utterly unsafe to apply the inferences sought to be deduced from such experiments to the fact in dispute, unless there can be found in such experiments, and the subject-matter which it is their object to explain or illustrate, some point of similitude or ground of common resemblance, always present, as a result induced by a similarity of conditions or circumstances. It may be suggested that some identity of resemblance may be traced in the powder burns exhibited by the experiments as the result of near shots, and in the wounds of the deceased which the medical authorities indicate, are usually, if not always present in "near" wounds. But when, as here, the case is not susceptible of direct proof, and the fact in issue — whether the ball was fired near or from the distance — depends of necessity for a correct determination upon the appearance of the wound, the fact and its experienced consequences does not belong to the ordinary information of men, but lies within the limits of a particular branch of medical science, and requires to be proved by persons skilled in it, the better to enable the jury to reach a safe conclusion. In *Rash v. State*, 61 Ala. 89, it was held that one not a surgeon or expert, although he had been in war, and seen the range of balls in gunshot wounds, was properly excluded from testifying on a trial for murder by shooting. It would seem, then, hardly to be safe to permit non-professional witnesses to prove, through the instrumentality of experiments, matters not within the range of their observation and experience and of which they are supposed to be incompetent to deal. But besides this, when it is considered how much other marked characteristics in conjunction with powder burns aid in determining the fact of near wounds — what seemingly immaterial circumstances — even the kind or compound of the wadding used, may affect the appearance of gunshot wounds, how fundamentally different is the human body in nature and texture from the substance upon which

the experiments were made ; and when it is considered how important it is that experiments should be based on conditions and circumstances as nearly as possible like the matter they are intended to illustrate, to avoid the liability to misconception, or error from some supposed agreement or resemblance, we should certainly hesitate to admit such experiments as evidence unless supported by reason or sanctioned by authority.

In *Commonwealth v. Piper*, 120 Mass. 188, it is held that unless the experiments are shown to have been made under conditions the same as those existing in the case on trial, the tendency is to confuse and mislead the jury. *Edt v. Cutler*, 127 Mass. 523. And in all the cases which have come under our observation, where such evidence has been held as admissible, the experiments were made with like means on the same kind of stuff or substance, or were based on a similarity of conditions or circumstances whereby the results produced betray with some certainty and uniformity, a common similitude or agreement, and as a consequence thereof furnish a safe foundation for inference, or the truth of the matter sought to be established. In *State v. Blair*, found in the notes to Wharton's Criminal Evidence, § 312, the experiments admitted in evidence were made with the same kind of pistol on the same kind of stuff as that of which the outer garments of Armstrong, the person shot, were made. But in *Commonwealth v. Twitchell*, 1 Brewster, 566, where the object of the experiments was to ascertain the facility of breaking a human skull with a poker, and the witness testified that he had made experiments upon another skull with a poker like the poker with which the skull of the deceased had been broken, the evidence was rejected. In *Smith v. State*, 2 Ohio St. 513, the evidence of the experiments, which was decided ought to have been admitted, showed the experiments to have been made under similar conditions and like circumstances to the act in issue. Again, in *Sullivan v. Commonwealth*, 93 Penn. St. 285, the deceased was shot through her gown in the abdomen, and the experiments were made by a physician upon similar stuff with the same pistol loaded with cartridges out of the same box, who at the trial was called as an expert to show the effect of powder marks where a pistol is fired at short range, and it was held that his testimony and the muslin used in his experiments were admissible. But even if it be considered a matter of doubt whether the evidence objected to was proper or otherwise, we should feel bound *in favorem v. læ* to hold that in this

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case it was inadmissible, as it was pressed by the State as of vital consequence.

[Minor question omitted.]

But from the views before expressed, the judgment must be reversed and a new trial ordered.

Judgment reversed.

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(11 Oreg. 277.)

Negotiable instrument — warehouse receipt.

In the absence of statute provision a warehouse receipt is not negotiable, and an assignment of it conveys no better title than the assignor had.

REPLEVIN. The opinion states the case. The defendant had judgment below.

George B. Dorris, for appellant.

George S. Washburn and *Strahan & Bilyeu*, for respondent.

LORD J. This was an action of replevin, brought for the possession of one thousand bushels of wheat, or its value, if delivery could not be had upon a warehouse receipt given by the defendant to one Skye Meek and by him transferred to the plaintiff.

Sufficient for the purposes of this case that the facts are that Skye Meek, a tenant of Samuel Meek, delivered to the defendant at his warehouse for storage, twenty-three hundred and eighteen bushels of wheat, from which he received from the defendant three warehouse receipts. Two of these receipts, viz., for six hundred bushels and one thousand bushels of wheat, were issued in the name of Skye Meek, and the other, viz., for seven hundred and eighteen bushels of wheat, was issued in the name of S. Meek. Of the twenty-three hundred and eighteen bushels of wheat deposited for storage Skye Meek was entitled to one-half of that amount as the tenant of Samuel Meek, to whom the other half belonged; but of the respective interests of these parties in the wheat, the defendant had no knowledge at the time such wheat receipts were issued. Skye Meek transferred these receipts to the plaintiff, who

purchased them of him in good faith, and for value, and also gave notice to the defendant of his purchase of the same when done; and upon which receipts the defendant delivered to the plaintiff thirteen hundred and ninety-four bushels of the wheat thus stored; but the delivery of the same to the plaintiff was not made under any particular receipt or receipts, nor were any of the receipts delivered up to the defendant, but were and are still held and retained by the plaintiff.

Prior to the demand of the plaintiff for the wheat mentioned in the receipt for one thousand bushels, and before the commencement of this action for the same, Samuel Meek had demanded of the defendant his half of the wheat stored (one thousand one hundred and fifty-nine bushels), and the defendant delivered to him nine hundred and twenty-four bushels, being the balance in his possession. Upon this state of facts substantially, the action was tried before the court, without the intervention of a jury, and a judgment was rendered against the plaintiff and in favor of the defendant for his costs and disbursements.

The only real or important question presented by this record is as to the negotiability of warehouse receipts. In the court below, as well as here, the theory upon which the plaintiff maintained his action was that a warehouse receipt is negotiable, and that consequently it is immaterial whether Skye Meek owned the wheat for which the receipt called, the transfer of the wheat receipt gave him the right to the wheat.

At the outset, it must be premised that there is no statute of this State which makes such receipts negotiable, and in the absence of such legislation warehouse receipts are not negotiable instruments in the commercial sense, so as to bind the maker to the assignee in all cases.

The holder of such a receipt takes no better title, nor occupies any more advantageous position than if the goods themselves were held by him. A receipt given by a warehouseman for property placed in his possession for storage is not, in a technical sense, like a bill of exchange, a negotiable instrument, but it merely stands in the place of the property it represents, and a delivery of the receipt has the same effect in transferring the title to the property as the delivery of the property. In *Burton v. Curyea*, 40 Ill. 327, the court say: "The principle applied in all cases is that the delivery of warehouse receipts is a symbolic delivery of the property itself ;

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that it has the same effect as the delivery and can have no greater, and that a transfer of a warehouse receipt by the person in possession of it gives no higher title than would the transfer of the property by the same person." In *Hale v. Milwaukee Dock*, 29 Wis. 485; s. c., 9 Am. Rep. 603, it is held that a warehouse receipt is negotiable only to the same extent and for the same purpose as a bill of lading or carrier's receipt. The indorsement or delivery of it does not convey the contract itself, but only the property represented by it, and it becomes the mere evidence of the title of the holder in such property.

These cases ably and exhaustively review the authorities upon this subject and the analogies of law as applied to instruments of similar purport, and the conclusion to be deduced from them, and which is decisive of this case, is that the transfer of a wheat receipt issued by a warehouseman is simply in effect a transfer of the wheat, or operates as a symbolical delivery equivalent in the then situation of the property to the delivery of the property itself, and passes no better title to the purchaser than a delivery of the wheat itself. *Luckbarrow v. Mason*, 1 Smith L. C. (7 Am. ed.) 1879; *Second National Bank v. Wolbridge*, 19 Ohio St. 419; *Insurance Co. v. Kiger*, 103 U. S. 356.

The judgment of the court below is affirmed.

Judgment affirmed.

WATSON, C. J., concurred.

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(11 Oreg. 406.)

Mortgage — chattel — evidence — lien for further advances.

The record of a bill of sale, apparently absolute, but shown by parol to be a mortgage, is effectual as to third parties as notice of a mortgage.

A mortgage for future advances attaches only from the date of the advances.

FORECLOSURE. The opinion states the case.

Albert S. Frank, for appellant.

P. L. Willis, for respondents.

LORD, J. The plaintiff took from the defendant, Nelson, a bill of sale, intended to operate as a mortgage of certain property belonging to him, and which the plaintiff left in his possession and which the defendant, Betts' Spring Co., attached after such bill of sale had been filed and recorded. Thereafter the plaintiff commenced suit to foreclose, and the defendant, Betts' Spring Co., answered, claiming the lien of said attachment was to be preferred to any lien or rights accruing under such bill of sale. After issue joined the matter was referred to a referee, who, after taking the evidence, reported to the court his findings of fact and conclusions of law. These findings were set aside by the court below and a decree rendered adjudging the lien of the plaintiff under such bill of sale to be prior to that acquired by the attachment, and from which decree the defendant, Betts' Spring Co., appeals to this court.

As grounds of error, it is alleged (1), that the bill of sale was not entitled to be entered of record as a mortgage, and must therefore be postponed to the lien of the attachment; and as a matter of law was fraudulent; (2) that the bill of sale was executed and delivered without consideration, and with the intent to defraud delay and hinder creditors; (3) that the amount of the consideration recited in the bill of sale was in excess of the amount due and owing the defendant, Nelson, by the plaintiff, and exceeded such indebtedness in the sum of \$750. As a reply to the matter of false consideration, the plaintiff alleged that it was given to cover future advances; and further alleged that previous to and up to the time of the execution and delivery to him of the bill of sale now in question, the defendant, Nelson, more than a year prior to this had executed and delivered to him, for a valuable consideration, a bill of sale to secure the same debt, and which was duly filed in the clerk's office and which up to the time of the execution and delivery of the last bill of sale—the one now in dispute—covered nearly all of the same property. It is hardly necessary to cite authorities to show that a bill of sale absolute in its terms becomes a chattel mortgage upon proof by parol that it was made to secure a debt. It is the nature of the transaction at its inception which determines the character of the instrument. If it be in form a bill of sale, but the transaction was intended to secure a debt, it is a mortgage, and parol evidence is admissible to show the true nature of the transaction for this purpose. And it is not only a mortgage between the parties to it, but also as to third parties who are

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affected with notice. Jones Chattel Mort., § 22 and n. The evidence shows that the bill of sale was given to secure a debt of \$2,250 and for future advances not to exceed \$750, making a total of \$3,000, the amount of the consideration recited in the bill of sale.

[Omitting minor statements.]

It is clear, as between the parties, the bill of sale was intended to operate as a mortgage. But did the filing of it in the clerk's office have the effect to convey notice to third parties? Upon this point, the counsel for the defendant, Betts' Spring Co., contends that the instrument being in a form of a bill of sale, the record can only convey notice of a bill of sale, and as there was no sale in fact, the instrument was evidently false, and as a consequence thereof, legally fraudulent and void; and further, that the record, owing to the form of the instrument, does not convey notice to all. Our statute provides that it shall be the duty of the county clerk, upon the presentation for that purpose, of any mortgage or conveyance intended to operate as a mortgage of goods and chattels, or a copy of any such instrument, upon the payment of his fees, to indorse thereon the time of receiving of the same, and to deposit such instrument or copy in his office, to be kept for the inspection of all persons interested. Code, p. 522, § 46. This is all the provision in our law upon this subject.

A bill of sale as such is not entitled to record, and a record so called of a bill of sale is an absolute nullity. The instrument in question was entitled to record only as and because it was a mortgage; and if the record is notice at all it is notice as a mortgage. Mr. Jones in his work on Chattel Mortgage says: "A bill of sale absolute upon its face, but executed as a security and intended to operate as a mortgage, is within the operation of a statute making void a mortgage not recorded, in case the property be not delivered to and retained by the mortgagee. Jones Chattel Mortg., § 275. In *Rhun v. Graves*, 9 Iowa, 305, it is held that a bill of sale of personal property, in which there is no stipulation that the vendor shall retain the possession, is, if filed for record, notice to subsequent purchasers and to creditors, even when the property remains in the possession of the vendor.

In Howell's Annotated Statutes of Michigan, it is said that section 6193 (which is almost identical with section 46, Oreg. Code, p. 522), was designed to provide a system applicable to every instru-

ment or conveyance intended to operate as a mortgage of goods and chattels, and to this extent it supersedes and takes the place of section 6190 (which is of similar purport to sub. 40 of section 766, Oreg. Code, p. 262). That under section 6193 the question of good faith and want of any intent to defraud creditors of the mortgagor and purchasers in good faith, cannot arise. And that as to them nothing short of a change of possession or filing of the instrument as the section requires can save it. *Cooper v. Brock*, 41 Mich. 491-2. And in that State it has been held that a bill of sale, or other conveyance of goods and chattels, although absolute in terms, if given as a security, is a mortgage. *Fuller v. Parrish*, 3 Mich. 211; *Parsell v. Thayer*, 39 Mich. 467; *Hurd v. Brown*, 37 Mich. 484. And unless filed as a mortgage or followed by an immediate change of possession, it will be void as against creditors and subsequent purchasers. *Hurd v. Brown*, *supra*. The instrument was entitled to record according to its real character. *James v. Morey*, 14 Am. Dec. 475, and note of authorities, 513. Being intended to operate as a mortgage, it was filed as such with the proper officer of the county, and filed by him in his office for the purpose of imparting the notice designed by the statute. A chattel mortgage is recorded by filing it in the office, and there is no law for recording any other instrument in that way. When therefore the clerk received it, and placed it on file in his office, it became the record of a chattel mortgage. This filing or registration was equivalent to change of possession of the property, or obviated the necessity of it. Although the law requires such instruments to be indexed among chattel mortgages, it would seem that the omission of the clerk to do it would not invalidate such mortgage as to third parties for want of notice, as the index constitutes no part of the record. *Board of Com. v. Babcock*, 5 Oreg. 472.

The only remaining question is as to the validity of a chattel mortgage to secure future advances, which includes the two last grounds upon which error is claimed. Upon this subject, Mr. Herman said: "In respect to the validity of mortgages for existing debts and future advances, there can be no doubt, if any principle of the law can be considered settled by the decisions of the courts, that a mortgage made to secure future liabilities and contingent debts, described with reasonable certainty, in the absence of all fraudulent intention, is valid, and this, whether the matter of future advances appear on the face of the instrument, or not, is proved solely by

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the testimony of witnesses." Herman Chat. Mortg. § 53, 111, and authorities cited in note. The fact is, this whole subject has been considered by this court, and the principle decided covers the case at bar. In *Hendrix v. Gore*, 8 Oreg. 409, the court say: "The true principle to be deduced from all these cases seems to be, that when a mortgage is given in good faith to secure a present indebtedness and future advances, whether the object be expressed in the mortgage or not, it is valid to the extent of the lien therein expressly created. It is always better however that the mortgage should be drawn so as to show the true object and purpose of the transaction, for suspicion is engendered by misrepresentation, but disarmed by a statement of the truth." *Shirrus v. Caig*, 7 Cranch S. C. 34. The effect of the omission is to render the transaction more liable to suspicion and to put the holder of the mortgage upon stricter proof of payment of the consideration, but the omission does not render the security invalid.

The existence of the indebtedness as set up by the plaintiff in his complaint is undisputed. There is no evidence of fraud, or that the consideration was greatly in excess of any advances expected to be made. It seems however that counsel for the defendant, Betts' Spring Company, supposed that there must be some binding obligation to make future advances, which the defendant, Nelson, could have enforced against Necklin. But this is not so. Expectation to make future advances is sufficient, only with this difference from when the party is legally bound, namely: That the lien will only attach from the date of the advance and not from the date of the mortgage. *The Bank Mort. Co's. Appeal*, 36 Penn. St. 172; *McClure v. Roman*, 52 Penn. St. 460; *Brown v. Keifer*, 71 N. Y. 610; 101 U. S. 626; *Commercial Bank v. Cunningham*, 35 Am. Dec. 325.

[Minor statement omitted.]

Judgment affirmed.

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(11 Oreg. 431.)

Mandamus — to compel levy.

Mandamus does not lie to compel a sheriff to levy.

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APPPLICATION for mandamus. The opinion states the case. The writ was denied below.

Edward Bingham, for appellant.

J. C. Moreland, for respondent.

LORD, J. This was an application for a writ of mandamus to compel the defendant, as sheriff of Multnomah county, to levy a writ of execution and to make due return thereof, based substantially upon this state of facts: That on the 22d day of April, 1884, the petitioner duly recovered a judgment against S. Herman in an action in the Circuit Court of Oregon for Columbia county, for \$100 damages, and costs and disbursements taxed at (about) \$65, and for the possession of certain saw-logs; that said judgment was duly rendered and entered in said court on said date; that on or about April 26, 1884, the petitioner duly caused an execution to enforce said judgment to issue to the sheriff of Multnomah county, Oregon; that said execution was duly issued on or about said day, and on the 28th of April, 1884, it was delivered to said sheriff of Multnomah county, Oregon, with directions to execute it forthwith for said damages and costs; that on May 3, 1884, said sheriff had done nothing with said execution, and when requested thereafter by the petitioner's attorney, he neglected and finally refused to execute said writ and still does so; that said judgment debtor, S. Herman, has ample personal property, subject to execution, in the city of Portland, Multnomah county, Oregon, to satisfy said judgment and execution; that said sheriff knows of said property and where it is; that the petitioner is still the owner of said judgment, and that said execution has not been stayed up to this time, and that both said judgment and execution are still in full force and effect; that said S. Herman has no property in said Columbia county. An order having been made upon the defendant to show cause, he filed a demurrer to the petition on the ground that the facts alleged were insufficient to authorize the issuance of the writ of mandamus, which demurrer the court below sustained, and the plaintiff appeals to this court.

The purpose of a writ of execution is, to authorize the officer to whom it is directed and delivered, to seize and hold the property of the debtor for the satisfaction of the amount ordered to be made by

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such writ. And in the absence of instructions, it is his duty to proceed with reasonable celerity and promptness to execute it in accordance with its mandates. If at the time of the delivery of the writ, the plaintiff, being apprehensive of the loss of his debt unless it be immediately levied, directs the officer to proceed forthwith, or points out property belonging to the defendant and requests its seizure, it is his duty to make every possible effort to comply with such directions or instructions consistent with a just regard for other duties which may devolve upon him, or he will be answerable for the consequences, if any injury or loss result to the plaintiff by reason of any neglect or omission of such duty. Of course it is not intended by this to lay down any fixed rule which would be applicable to every action for damages against such officer for negligence, or omission of duty, without regard to the particular facts and circumstances which might be offered by way of defense in explanation of his conduct. It is readily admitted that "many facts and circumstances might exist, which would authorize a jury to find that delay in a given case was reasonable, when if unexplained, the court would not hesitate to hold as a matter of law that it was unreasonable." Our purpose is simply to state the duty which the law imposes upon such officer, and which, in the absence of any explanatory facts and circumstances, would establish, as a matter of law, the clear legal right of the plaintiff to the performance of the duty. *Freeman Executions*, §§ 107, 252; *Herman Executions*, §§ 158, 159, 408, and cases cited in notes. Upon the facts as presented and admitted by the demurrer, it was the legal right of the plaintiff to have the performance of the particular duty which he requested at the hands of the defendant. This is incontestable. But does the refusal of the defendant, or his neglect to perform a duty which the law imposes upon him, afford sufficient ground for relief by mandamus? Under the Code, the office of the writ is precisely the same as it was under the common law. *Warner v. Myers*, 4 Oreg. 75; *Durham v. Monumental S. M. Co.*, 9 Oreg. 43. It may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office trust or station. * * * The writ shall not be issued in any case where there is a plain, speedy and adequate remedy at law. Civil Code, § 583. The object of the writ is to prevent a failure of justice, and is based upon reasons of justice and public policy. "The reason why we grant these writs,"

said Lord HARDWICKE, when presiding in the King's Bench, "is to prevent a failure of justice, and for the execution of the common law, or of some statute, or of the King's Charter." *Rex v. Wheeler*, Cas. temp. Hardw. 99; s. c., Cunningham, 155. To the same effect, but more fully, Lord MANSFIELD expressed himself as follows: "A mandamus is a prerogative writ, to the aid of which the subject is entitled, upon a proper case previously shown to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice. The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied. *Rex v. Barker*, 3 Burr. 1265, 1267. In brief, the writ is a summary remedy, for the want of a specific one, where there would otherwise be a failure of justice. *State v. Graves*, 19 Md. 374. Its object is not to supersede, but to supply the want of a legal remedy. To authorize its issuance, two facts must co-exist, the right to have the particular act or duty performed and the want of an adequate or specific remedy at law. In determining then the question presented by this record, it is not sufficient to warrant the relief prayed for that the plaintiff has a clear legal right to have the duty performed, but it must also appear that the law affords him no other specific legal remedy, fully adequate to redress his grievances. Has the plaintiff such a remedy in the ordinary course of the law for the negligence or breach of duty of which he complains? A remedy so complete and adequate as will afford him full compensation for any injury or loss which he may have sustained? If the answer to this question be in the affirmative, there will be no failure of justice and the writ must be denied. At common law, the remedy for negligence or violation of duty by a sheriff or other ministerial officer was by action on the case, although the proceeding, owing to particular facts, often took the form of trespass. In *Shearman and Redfield on Negligence*, § 511, it is said, that "the functions of sheriffs and other officers charged with the execution process are

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purely ministerial. Their duties are generally prescribed by statute; for their negligence or other official misconduct special statutory remedies are provided; and for particular breaches of duty, special penalties are imposed. Such enactments do not, however, unless by their express terms, supersede the common-law liability to which every ministerial officer is subject. Therefore a statute which gives an action of debt against a sheriff for an escape, or for neglect to levy an execution, does not impair the common-law remedy of action on the case." Sedgw. Dam. 443. A sheriff's bond is unknown to the common law, and derives its existence wholly from the statute. It is provided by the statutes of this State, that the sheriff before entering upon the duties of his office shall give and file an official undertaking in the sum of \$10,000 that he will well and faithfully perform the duties of such office. Gen. Laws, p. 692-3. Further provision is also made by the Code for actions on official undertakings (§§ 337, 338, 339,) and for escapes, and the liabilities of sheriffs therefor (§§ 970, 971, 972), and also the time within which an action against a sheriff shall be brought for an omission of official duty (sub. 1, § 7). It thus appears that if the plaintiff has suffered any loss from the failure or refusal of the defendant to make the levy, the law affords him a specific remedy against the defendant directly, or on the bond given by him for the faithful discharge of his duty and against the sureties whose undertaking was co-extensive with the duties of the sheriff. The sufficiency of the remedy by an action against the sheriff and his sureties upon his official bond to fully indemnify the party aggrieved is well illustrated by the case of *Miller v. State*, 61 Ind. 503, in which the facts were stronger than here, and showed that the officer not only failed and refused to make the levy, though requested so to do and the property pointed out to him, but returned the execution unsatisfied. No resort was had to this extraordinary writ of mandamus, for the reason that the law supplied an adequate remedy and one better suited to determine the right and justice of the case. To the rules or principles governing actions for negligence or omissions of duty of officers, either directly against the officer or upon his official bond, it is not necessary now to advert. Upon this subject generally, see Shearman and Redfield Negligence, §§ 515-548; Sedgw. Dam. 443-482; Freeman Executions, §§ 107, 252; Herman Exns., §§ 407 and 408. Our purpose is simply to show that the law furnishes a specific remedy,

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tully adequate, to redress the grievances of which the plaintiff complains and thus prevent a failure of justice. By resort to this, his rights will be protected, and any injury or loss he may have suffered be redressed or fully compensated. When the law furnishes such remedy, it is a complete bar to relief by the writ of mandamus. The judgment must be affirmed.

Judgment affirmed.

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(11 Oreg. 486.)

Attorney — disbaring — indictable offenses.

An attorney may be disbarred even for an indictable offense and before prosecution.

PROCEEDING to disbar an attorney. The opinion states the facts.

Geo. H. Durham, for plaintiff.

Raleigh Stott and *C. B. Bellinger*, for defendant.

LORD, J. This is an information on the relation of Hugh McCormick, filed in this court, against F. D. Winton, asking for an order to show cause why he should not be removed from his office as an attorney of this State. The facts alleged are in substance of this character: In the year 1883, at a regular term of the Circuit Court for Clatsop county, the complainant, James Franklin, Wm. Bannister, James McCarty, Jas. Driscoll and Wm. Loyd were indicted by the grand jury of said county for the crime of kidnapping. As their attorney, the defendants so indicted employed the said Winton to defend them, and paid him the full amount he demanded as his fee to make such defense. Of the defendants indicted upon said charge, James Franklin was first put on trial, but the jury failing to agree, were discharged by the court. Upon this result it is alleged that the said Winton "then well knowing that the said Franklin could not be again tried during that term of the court,

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but desiring to take advantage of his client and extort money from him and his friends, went in person to Mrs. B. Grant, in whose employment the said Franklin then was, and told her that if Franklin was tried again during that term he would surely be convicted, but that if she would give him \$300 he would see that the case was continued until the next term of said court; that he could influence the prosecuting attorney to continue the case." The indictment against the other defendants, including the complainant, was not tried during the January term, but was continued until the August term of said court, 1883. The information then proceeds as follows: "That immediately thereafter and prior to the transactions hereinafter stated, the said Winton became possessed of information which satisfied him that the prosecuting attorney did not intend to prosecute the case against the said McCormick, but intended to dismiss the same, and in the month of —, 1883, the said Winton represented to the said McCormick and to one Mrs. Louise Collins, with whom he was engaged in business, that if they would pay him sufficient money, he could and would corrupt the prosecuting attorney and prosecuting witnesses and cause said action to be dismissed, and that said McCormick's only safety was in getting such action dismissed; that he could corrupt the said witnesses and officer, and secure the dismissal of said action; and the said Winton thereby induced the said McCormick and Mrs. Collins to pay to him the sum of \$900 for said purpose, although he well knew said action would be dismissed in any event, and knew that his said clients were ignorant of such fact, and that he only made such representations for the purpose of extorting money from said McCormick and Mrs. Collins," etc. By reason of the premises, it is further alleged that the said Winton has been guilty of willful deceit and misconduct in his profession and of violating the confidence reposed in him by his clients.

An order having been granted to show cause, the said Winton appeared and answered. By consent the case was referred to a referee to take the testimony and report the same to the court. At the time appointed for the hearing — the evidence and report of the referee having been submitted — it was suggested by counsel for the defendant that they desired to interpose an objection to the power or jurisdiction of the court to make the order upon the facts alleged, before proceeding to read the evidence and a trial upon the merits. Leave to raise the objection as if the same had been regu-

larly taken by demurrer was conceded to be the legal right of the defendant, and granted. This objection is that when a crime is charged against an attorney for which he may be indicted, the court will not entertain jurisdiction in such case, until he has been regularly convicted by a jury in a criminal proceeding; or conceding the right of the court to make the order to show cause, it will refuse to proceed, at least, when such charge is denied and not confessed by him. We are therefore to consider whether such a case has been presented by the facts alleged, or by the facts alleged and denied, as will authorize the court to act — to exercise its summary power of suspension or disbarment.

Our Code provides that an attorney may be removed or suspended by the Supreme Court for either of the following causes, arising after his admission to practice : 1. Upon his being convicted of any felony or misdemeanor involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence ; 2. For a willful disobedience or violation of the order of a court requiring him to do or forbear an act connected with or in the course of his profession ; 3. For being guilty of any willful deceit or misconduct in his profession ; 4. For a willful violation of section 1006, which among other things imposes upon an attorney the duty to employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and to maintain inviolate the confidence of his clients. Code, § 1015.

The proceeding here is upon the information of another than the court, or any of the judges thereof, and is verified by the oath of the party making the accusation ; and in such case, unless it appear that the accused should be required to appear and answer the same, the accusation shall be dismissed at once. §§ 1016, 1017, 1018. At the time appointed in the order the accused must appear and answer the accusation, unless for sufficient cause the court assign another day for that purpose, and if he do not appear the court may proceed and determine the accusation in his absence. § 1019. He may demur to the accusation for insufficiency or controvert it by answer. The demurrer and answer are required to be in writing, and the latter is to be verified by the oath of the accused in the same manner as a pleading in an action at law. § 1020. If the demurrer for insufficiency be not sustained the accused shall answer forthwith. If he plead guilty, or refuse to answer the accusation, the court shall proceed to judgment of removal or suspension. If

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he controvert the matters charged the court shall then, or at such time as it may appoint, proceed to try the accusation, and give a judgment of removal, suspension or acquittal, according to the law and the right of the case. § 1021.

At common law attorneys were, as now under the statute, officers of the court; and as such they were liable to be punished in a summary way, either by attachment or having their names struck out of the roll of attorneys, for any ill practice attended with fraud and corruption and committed against the obvious rules of justice and common honesty. Bacon's Abridg. "Attys." II. This is an inherent power residing in the court without the aid of any statutory enactment. The exercise of the power may be, as it often is, regulated by statute, but the statute does not create it. Its existence is necessary and incidental to the court for its own protection, to secure the proper administration of justice, to maintain the prestige of the profession for integrity, to conserve the public good and to protect clients from malpractice attended with fraud and corruption. *Ex parte Smith*, 28 Ind. 47; *Penobscot Bar v. Kimball*, 64 Me. 140; *Fletcher v. Daingerfield*, 20 Cal. 427; *In re Wooley*, 11 Bush, 95. It is therefore laid down by the text-writers upon this subject as deducible from the practice and decisions of the courts in such cases, that a court has the inherent right to exercise this summary jurisdiction over its attorneys as officers of the court, to require and compel them to deal justly and honestly with their clients, and to punish them by fine and imprisonment for contempts or misconduct in their office, and in cases where the malpractice or misconduct in their professional capacity showed them to be unfit persons to practice the law, to strike their names from the roll. 1 Tidd Practice, 89 (ed. 9); Archibald Practice, p. 148 (Chitty's ed.)

The question which has presented the most difficulty, and out of which there has grown some difference of opinion, is where the facts charged against the attorney are indictable, but are in nowise connected with his professional employment — acts done in his private, but not in his professional capacity. In such cases, it has been held by some courts, that where the misconduct alleged, though done in his private capacity merely, and not in his official capacity, is of such gross character as to gravely affect his standing as an attorney, they will exercise the power of removal or disbarment. This seems to be an exception to the general rule as held by other courts, which confines the exercise of such summary juris-

diction over an attorney to cases where the misconduct was committed in his professional character, or was in some way, or in some matter, so connected with his professional character as to be the direct result of it. Courts adhering to this rule, when the misconduct alleged constitutes an indictable offense not growing out of, or in any way connected with his professional employment or duties, refuse to proceed in this summary manner, but leave the party injured to obtain relief by a prosecution in the proper court, or the matter to be prosecuted by a public officer upon whom the law devolves the duty of prosecuting criminal offenses. But there is no doubt much authority for extending the rule to misconduct for acts which are indictable and committed outside of the professional relation, when the misconduct alleged against the attorney is so gross as to seriously impugn his standing and integrity.

In *Ex parte Wall*, 107 U. S. 266, this whole subject is ably and exhaustively reviewed by Mr. Justice BRADLEY, and all the authorities bearing upon it, both English and American, are critically reviewed and examined. The crime charged in that case was committed by the attorney in his private capacity as an individual, but it was perpetrated under such circumstances of outrage and open defiance of the laws, and in such utter disregard of the duties which the law imposed upon him as an officer of the court, sworn to uphold the laws and to assist in its proper administration, that it was considered by the court to belong to that class of cases in which the court was authorized to exercise its summary powers, when the offense charged, though indictable, and not done in a professional capacity, gravely affected the character of the attorney, and showed him unfit to be intrusted with its high duties. The contention of the defendant was, that when a crime is charged against an attorney for which he may be indicted, and the truth of the charge is denied or not confessed by him, it cannot be made the ground of an application to strike his name from the roll until he has been regularly convicted by a jury in a criminal proceeding, when the act charged was not committed in his professional character. As a result of an examination of all the English authorities, Mr. Justice BRADLEY deduced this rule from them: "That an attorney will be struck off the roll if convicted of a felony, or if convicted of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also (without previous conviction) if he is guilty of gross misconduct in his profession, or of acts which

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though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable, and are fairly denied, the court will not proceed against him until he is convicted by a jury; and will in no case compel him to answer under oath to a charge for which he may be indicted." This rule, it is asserted, has been in the main adopted by the courts in this country, though special proceedings are provided for by statutes in some of the States.

The learned judge then proceeds to review and cite the authorities in this country *pro* and *con*, and deduces this result: "That whilst it may be the general rule that a previous conviction should be had before striking an attorney off the roll for an indictable offense committed by him when not acting in his character of attorney, yet that rule is not an inflexible one. Cases may occur in which such a requirement would result in allowing persons to practice as attorneys, who ought on every ground of propriety and respect for the administration of the law, to be excluded from such practice." But in cases of this character, it is admitted that the power ought not to be exercised without great caution, and never except in clear cases of misconduct which affect the standing and character of the party as an attorney.

The case before us is not one committed outside of the professional relation and in the private capacity of the defendant, and therefore does not require of us any decision or expression of opinion upon that aspect of the question. Our reference to this phase of the subject has been for the purpose of showing the extent to which the authorities have gone in the exercise of this summary jurisdiction, and the grounds upon which they have founded it, so as to make more clear and evident the duty and authority of the court to act in the matter which we are required to decide. It is not denied that the matter with which the defendant is charged, though an indictable offense, was committed in his professional employment. Taking the facts alleged as true, it was in fact in his capacity as an attorney, and employment as such, that he was enabled to effect the result of which the relator complains. For the purposes of this inquiry, all this is admitted. But it is contended that the matter charged, although done in his professional character, constitutes an indictable offense, and cannot be tried in this summary way, or at least the court will refuse to proceed in such cases when the charge is denied and not confessed.

Upon the first part of this proposition, the contention is, that the authorities are uniform in holding that the court will in no case compel a defendant to answer under oath to a charge for which he may be indicted, whether committed in his professional or private character, but that under the provisions of the Code referred to, the defendant is required to make a sworn answer, or in the event of a refusal the court may proceed to judgment of suspension or removal — a result which, it is claimed, is inconsistent with the theory of jurisdiction in such cases without previous conviction or confession, and which show that the purpose of the proceeding, as mapped out by the Code, was to confine the inquiry or jurisdiction of the court to such cases of misconduct as do not constitute indictable offenses.

It is a fundamental principle of law, engrafted in the Constitution of the United States and in the Constitutions of the different States of the Union, that no man shall be required to criminate himself, or be held to answer for a crime, unless upon a presentment or indictment by a grand jury, and that the trial of all crimes, except in cases of impeachment, shall be by an impartial jury. A court cannot compel a defendant by his answer or otherwise to criminate himself. A proceeding by statute requiring an answer to be sworn to which would produce this result would be plainly unconstitutional and void, unless the court was invested with some authority to dispense with this requirement. The answer required to be verified by the oath of the accused in a proceeding of this character is the same as a pleading in an action at law. It is governed by the same rules and principles and is subject to the same limitations. When in the judgment of the court, an answer to an allegation in any pleading might subject the party answering to a prosecution for a felony, the verification to such answer may be omitted. Code, § 80. But without this in view of the constitutional inhibition, the court would be authorized in such cases to dispense with such requirement. All this becomes more evident, when the nature of the jurisdiction and the object of its exercise is understood and applied. But waiving this, it is however strenuously insisted that the court will refuse to proceed to try the matter when the malpractice alleged involves an indictable offense, and is denied and not confessed, upon the ground that the only proper evidence which the court can receive of the commission of such offense is a record of conviction. Or in other words, when the malpractice alleged is indictable and denied, it cannot be made the ground of an application for disbarment until

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there has been a regular conviction by a jury in a criminal proceeding. The vice of this argument lies in the assumption that the court is trying and determining a criminal offense with all its attendant results. Such is not the fact. The power of the court is not exercised for the purpose of reaching results which flow from the exercise of a criminal jurisdiction, but is directed solely to ascertaining whether, upon the facts alleged, although involving indictable matter, there has been a breach of official duty — misconduct in office. When the accusation against an attorney is for misconduct in his office, although involving matter for which he may be indicted, the inquiry is directed to the truth of the accusation only so far as it affects his character for trustworthiness or want of integrity, leaving the matter of the criminal charge to be prosecuted and punished by the courts constituted for that purpose. The character of the judgment would seem to make this all the more apparent. It is not a criminal judgment convicting or acquitting of a crime and carrying the consequences of such a judgment, but a judgment of suspension or removal from his office as an attorney. This shows that the jurisdiction acts upon the office, or upon the facts which show him unfit to hold such office. In none of the authorities is the proceeding recognized as one of punishment, but for the purpose of protecting the court and excluding from a participation in its councils those of its officers who are shown to be corrupt, dishonest, or untrustworthy. *Ex parte Wall, supra*. "It is not by way of punishment," said Lord MANSFIELD, "but the court in such cases exercise their discretion whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not." *Ex parte Brounsall*, Cowp. 329. Legal knowledge and skill are not the only requisites of an attorney, but they must be conjoined with that ancient requirement of the law, integrity of character. Before admission to his office, as regulated by the Code, he must prove by evidence satisfactory to the court that he is a person of good moral character, and show by an examination in open court that he possesses the requisite learning and ability. When satisfied that he possesses these qualifications, the court administers to him an oath to support the Constitution and laws of the United States and of this State, and to faithfully and honestly demean himself in office. Upon an order being entered reciting these facts, he receives his certificate of admission and becomes entitled to practice in all courts of this State. The order of admission is the judgment of the court

that he possesses these qualifications and is fit to be intrusted with the responsible duties of his office. It in effect certifies to the community that he is competent to advise in legal matters, or to conduct legal proceedings, and is of such "good moral character" as will be a pledge to those dealing with him professionally, of fidelity and honesty to their interests. And to this is added the sanction of his official oath, to be faithful, upright and honest in all the duties which may devolve upon him as an attorney. These duties often comprise grave responsibilities and interests of the highest conceivable character. Life, liberty, reputation and property are often intrusted to his care. It is indispensable that he be trustworthy, and of unswerving integrity of character in his official relations. As prerequisite to his admission, they must be enduring and distinctive traits of his character while he exercises the high prerogative of his office. A lapse from them, upon a proper showing, in his official conduct, is fatal to his right to be an attorney. Justice to the court, protection to the public, and the honor of his profession alike inexorably demand that he act with fidelity and honesty to the interests intrusted to his care. Whenever therefore it is made to appear to the satisfaction of the court that an attorney has been guilty of conduct or acts, committed inside or outside of his professional employment, which show him to be utterly unfit to practice law and to participate in the official ministration of justice, the court will exercise its summary powers and disbar him. The nature and extent of the inquiry, when involving indictable offenses not committed in a professional capacity, and denied, although a matter upon which some difference of opinion exists, are not material considerations here. The case before us, and against the defendant, is for misconduct in his office, the particular facts of which, as alleged, are admitted for the purposes of this hearing to have been committed in his professional employment. These facts show, to say the least, a gross violation of the confidence of his clients, and an utter want of fidelity and honesty to their interests. In cases of this character, where the malpractice or other misconduct is committed in his official capacity, although involving indictable matter, the authority of the court to exercise its summary powers of disbarment is sustained by an imposing array of judicial authority. "No question can be made," says Mr. Chief Justice SHARSWOOD, "of the power of a court to strike a member from the roll for official misconduct in or out of court." *Ex parte Steinman v. Hensel*, 95

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Penn. St. 220; s. c., 40 Am. Rep. 637; *Ex parte Walls*, 64 Ind. 461. When a case is presented of malpractice against an attorney, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty, it would be a scandal to the court, a reproach to the administration of justice, unjust to the public, and a grave wrong against an honorable profession, whose members have preserved a high standard of professional ethics, and some of whom, by their learning and ability, have added lustre to the bar and earned an enduring fame in the annals of their country, to refuse to act, or to exercise its summary powers, and thus continue him upon the roll, and hold him out to the world as a member of the bar worthy of confidence, and clothed with the prestige of its authority. There can be no doubt but that the office of attorney is ordinarily valuable to its possessor. It is often the source of great emolument to him. In the great majority of cases however it constitutes his only means of procuring a livelihood for himself and those dependent upon him for support, and to deprive him of it would be likely to leave him with blighted reputation and comparatively helpless to engage in other remunerative pursuits, thus entailing upon himself and family the wretchedness of want and poverty. In view of these grave consequences, it is of the highest consideration that the power be only exercised in a proper case, after a patient and careful examination of all the facts and upon the clearest legal proof, satisfying the court that his professional unworthiness is such that protection to the court, the public and the profession absolutely require his disbarment. Thus recognizing the responsibility of the duty which devolves upon us, we must hear this case.

The objection is overruled.

Objection overruled.

VAN WINKLE v. JOHNSON.

(11 Oreg. 469.)

Surety — contribution.

One surety, paying the whole obligation after judgment, may compel contribution from his co-surety for the costs, although the latter was not served with process.*

* See *Aldrich v. Aldrich* (56 Vt. 324), s. c., 48 Am. Rep. 791

ACTION for contribution. The opinion states the case.

Lucian Everts, for appellant.

J. J. Balleray, for respondent.

LORD, J. The plaintiff and defendant were sureties upon a promissory note executed by one James Johnson to the First National Bank at Walla Walla. James Johnson died insolvent. After the note became due the defendant called upon the payee and expressed his willingness to pay his part or share of the note, but he did not pay nor offer to pay the same. He also made some effort to notify the plaintiff of his readiness to make such payment of his aliquot part, but the information was never communicated to the plaintiff. Subsequently the holder and payee of the note brought an action to enforce its collection, but the defendant was not served with process. After the action was commenced, but before judgment was recovered, the defendant paid to the bank his moiety of the note. Thereafter a judgment was recovered against the plaintiff for the balance due upon the note, including costs, and a certain sum adjudged reasonable as attorney's fee, as stipulated in the note. This suit is brought to compel the defendant to contribute his share or moiety in payment of such costs and attorney's fee. The defendant insists that he is not liable for the reason that he has paid his part, and that the additional expense incurred as incidents of the action was due to the default and negligence of the plaintiff. The right to contribution is based upon the maxim, "equality is equity." Originally, it was enforced only in equity and on principles of natural justice. The right to it did not depend upon contract, but sprung from equitable considerations arising out of the relation of the parties to each other, and the fact of a common interest and a common burden to bear. "The right to contribution," says CHURCH, C. J., "between co-sureties depends upon principles of equity rather than upon contract. It is well settled that the liability exists, although the sureties are ignorant of each other's engagement. The equity springs out of the proposition that when two or more sureties stand in the same relation to a principal, they are entitled equally to all the benefits and must bear equally all the burdens of the position. In such case the maxim 'equality is equity' applies." *Wells v. Miller*, 66 N. Y.

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358. Although the obligation of co-sureties to contribute to each other is not founded upon contract, or any notion of an implied promise, yet the doctrine of contribution as applied and administered in equity has stood so long and been so universally recognized that a jurisdiction at law has grown up and become well settled. 3 Pom. Eq. Jur., § 1418, note; Brant Sur. and Guar., § 220. When therefore two or more persons jointly become sureties for another on a note for the payment of money, each surety becomes liable to the other to pay his share of the liability in the event of the failure or insolvency of the principal. "By becoming sureties," said APPLETON, C. J., "each impliedly promised the other that he would faithfully perform his part of the contract, and pay his proportion of the loss in case of the insolvency of the principal." *Hichborn v. Fletcher*, 66 Me. 210; s. c., 22 Am. Rep. 562. He is not obliged to delay payment until suit is brought. His liability accrues upon the maturity and non-payment of the note for which he is surety. If however it is not paid and a judgment is recovered against the principal and his sureties, or against the sureties alone, and one of them pays it, he can recover one-half of the costs of the suit from his co-surety. *Davis v. Emerson*, 17 Me. 64; *Newcomb v. Gibson*, 127 Mass. 398. In the former of these last cases, the court say: "The failure to pay which occasioned the costs was imputable to the defendant as much as the plaintiff. The plaintiff paid the execution including the costs. The costs cannot be distinguished from the debt. Every equitable principle which entitles the plaintiff to contribution for the one applies equally to the other." In such cases where the costs are recovered in a judgment against them jointly, it is clear then the costs have become a common burden, and each may recover of the other for the payment of more than his proportion. And it has been further held that a surety may not only recover of his co-surety a proportionate share of his costs, but also the expenses incurred in defending a suit where the defense set up was reasonable, hopeful and prudent. *Fletcher v. Jackson*, 23 Vt. 593; *Marsh v. Harrington*, 18 Vt. 150. As an incident of the common burden after suit brought, and when both are in default of payment, the liability for contribution for acts is founded upon the same equitable principles as is applied to the main obligation. In *Briggs v. Boyd*, 37 Vt. 534, the court say: "But this was a debt for which the plaintiff and defendant were jointly liable. Briggs was no more bound to pay the whole

of it than Boyd. As between themselves each was to pay one-half. Had Boyd paid his half or offered to pay it before suit, there would be ground for his saying that he ought not to contribute to the costs. But the costs were made in collecting the whole of the note from Briggs. As one appears to have been just as much in fault as the other in not paying the note, which led to the necessity of making the costs, we think they should bear equally the burden of the costs." Now what are the facts in the case before us? Both the plaintiff and defendant were in default of payment before the action was brought upon the note. As between themselves each was liable for his share, but neither paid his part or any portion of it before the action was commenced. It is true that the defendant had expressed a willingness to liquidate his share to the payee, but he did not pay it, or offer to pay it. It is true too he sent word to the plaintiff that he was willing to pay his share, but the message was never communicated to the plaintiff. As was said in *Boyd v. Briggs, supra*, had he "paid his half or offered to pay it before suit was brought, there would be ground for his saying that he ought not to contribute to the costs." Mere willingness, unaccompanied by any offer, is not sufficient. Had he tendered to the plaintiff an offer to pay his part and the plaintiff had refused or delayed in the acceptance of such offer, the case would stand different. It is clear that neither had any defense to the note; and whenever an action should be brought, the judgment with its incidents was inevitable. The fact that the defendant was not served with process is not material. So far as payment is concerned, they were equally in fault, and neither had done such things with respect to the other that would furnish any just reason for exoneration from liability. Suits for contribution against a co-surety for costs, like many other suits in equity, depend very much upon the particular facts of each case. Considerations of right and justice as applicable to the facts are the controlling principle in determining the result. Upon the facts as presented by this record, we are of the opinion the defendant is liable for his proportionate share of the costs, and a decree must be entered accordingly.

Judgment accordingly.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

STATE v. JACKSON.

(80 Mo. 175.)

Constitutional law — marriages between whites and negroes.

A statute declaring marriages between white persons and negroes a felony is constitutional,* and the enactment that the jury may determine the proportion of negro blood from the appearance of the person is not a violation of a constitutional provision that the legislature shall not pass any local or special law changing the rules of evidence.

INDICTMENT of a white woman for marrying a man of negro blood. Demurrer sustained below. The opinion states the case.

D. H. McIntyre, attorney-general, for State.

B. H. Whitelaw, for respondent.

HENRY, J. At the May term, 1880, of the Circuit Court of Cape Girardeau county, the defendant, a white woman, was indicted for having intermarried with Dennis Jackson, a person having more

* Same effect, *Frasher v. State* (3 Tex. Ct. App. 263), 30 Am. Rep. 131.

than one-eighth part of negro blood. A demurrer was sustained on the ground that the law on which the indictment was based, § 1540, Revised Statutes, 1879, is in conflict with the 14th amendment of the Constitution of the United States, as also with the 17th subdivision of § 53 of article 4 of the Constitution of this State.

Section 1540, Revised Statutes 1879, is as follows : " No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood ; and every person who shall knowingly marry in violation of the provisions of this section shall, upon conviction, be punished by imprisonment in the penitentiary for two years, or by fine not less than \$100, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment ; and the jury trying any such case may determine the proportion of negro blood in any party to such marriage from the appearance of such person."

We are unable to perceive any conflict between that section and the clause of our State Constitution which declares that : " The general assembly shall not pass any local or special law regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding or inquiry before courts." * * * It did not change the practice or jurisdiction or rules of evidence in any judicial proceeding or inquiry before any judicial tribunal. Besides it is not a special or local but a general law, embracing all citizens of this State, white as well as black.

It may interfere with the taste of negroes who want to marry whites, or whites who wish to intermarry with negroes, but the State has the same right to regulate marriages in this respect that it has to forbid the intermarriage of cousins and other blood relations. If the State desires to preserve the purity of the African blood by prohibiting intermarriages between whites and black, we know of no power on earth to prevent such legislation. It is a matter of purely domestic concern. The 14th amendment to the Constitution of the United States, to which, by some, magical power is ascribed, has no such scope as seems to have been accorded to it by the Circuit Court. It declares that : " All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State where

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they reside ;" and that : "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Every Chinaman, Indian and Hottentot born in the United States and subject to its jurisdiction, is under the definition of a citizen, contained in the 1st section of the amendment, a citizen of the United States ; and under the general, sweeping declaration of the latter clause of that section it is necessary to determine what are the privileges and immunities of citizens of the United States. They are those secured to them by the Constitution of the United States and law enacted in pursuance thereof. All of one's right as a citizen of the United States will be found guaranteed by the Constitution of the United States. If any provision of that instrument confers upon a citizen the right to marry any one who is willing to wed him, our attention has not been called to it. If such be one of the rights attached to American citizenship all our marriage acts forbidding intermarriages between persons within certain degrees of consanguinity are void, and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother.

The act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violations of its provisions by white as by colored persons, and an act of Congress interfering with such legislation and declaring that it should be lawful in Missouri for a black man and a white woman, or a white man and a black woman, to intermarry, would be without any binding force, because wholly unauthorized by any provision of the Constitution of the United States. In the *Slaughter House Cases*, 16 Wall. 36, the Supreme Court of the United States said with reference to the 5th section of the 14th amendment : "We doubt very much whether any action of a State, not directed by way of discrimination against the negroes as a class, will ever be held to come within the purview of this provision." In *Minor v. Happersett*, 21 Wall. 162, that court held that "the 14th amendment of the Constitution of the United States does not add to the privileges or immunities of citizens but only furnishes additional protection for the privileges already existing," and neither in the letter nor spirit of the Constitution can a citizen find his right to intermarry with any one whom he may select who is willing to accept him. The power of each State to regulate and

control marriages within its jurisdiction, is as unquestionable as State sovereignty, and as was observed by BUSKIRK, J., in the *State v. Gibson*, 36 Ind. 389; s. c., 10 Am. Rep. 42: "If the federal government can determine who can marry in a State, there is no limit to its power. It can legislate upon all subjects growing out of this relation. It can determine the rights, duties and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise and absorb all the powers of a local and domestic character. This would result in the destruction of the States." 1 Bish. Marr. and Div. (4 ed.) § 87; *State v. Kennedy*, 76 N. C. 251; s. c., 22 Am. Rep. 683.

It was held in *Burns v. State*, 48 Ala. 195; s. c., 17 Am. Rep. 34, that a statute of that State imposing a fine upon a justice of the peace for solemnizing the rites of matrimony between a white person and a negro, was abrogated by the 14th amendment of the Constitution of the United States, but that decision is in conflict not only with the weight of authority on the subject elsewhere, but with a decision of the same court, reported in *Ellis v. State*, 42 Ala. 525.

If that amendment does not add to the privileges or immunities of citizens, in what other section of the Constitution will the right of a white man to marry a negro woman, or a negro man to marry a white woman, be found? Marriage acts similar to the one under consideration were in force in most of the slave-holding states prior to the adoption of the 14th amendment, and their validity was never questioned (*United States v. Stanley*, 109 U. S. 3), no one supposing that there was, prior to that amendment, any provision of the Federal Constitution with which they were in conflict, and it is only by ascribing to that amendment a force and scope expressly denied it by the Supreme Court of the United States that any ground exists for questioning their validity now. Nor is it one of the natural rights of man to marry whom he may choose. Under the Jewish dispensation persons nearly related by ties of blood intermarried, but in no Christian land are such marriages tolerated. The right to regulate marriage, the age at which persons may enter into that relation, the manner in which the rites may be celebrated, and the persons between whom it may be contracted, has been assumed and exercised by every civilized and Christian nation; and the condition of a community, moral. mental

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and physical, which would tolerate indiscriminate intermarriage for several generations, would demonstrate the wisdom of laws which regulate marriage and forbid the intermarriage of those nearly related in blood. It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments.

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

All concur.

QUIGLEY V. MEXICO SOUTHERN BANK.

(80 Mo. 229.)

Negotiable instrument — transfer by agent — holding for collection.

An attorney, holding a note merely for collection, cannot confer title by indorsement in the owner's name and delivery without the owner's consent, even to an innocent purchaser.

SUIT for money received. The opinion states the case. The plaintiff had judgment below.

Forrist & Fry, for appellant.

T. B. Buckner with *Macfarlane & Trimble*, for respondent.

SHERWOOD, J. Action by Quigley to recover from the bank the amount due on a promissory note, which had been collected by the bank from Woolwine, the maker, Quigley being the payee and the note payable to his order. The bank claimed to be an innocent holder. There was testimony that the note in question was left with H. S. Clark, an attorney, for collection, and for no other purpose. There was testimony also that the note was not indorsed by the payee, and there was testimony of a contrary effect. The testimony also tended to show that the bank was a purchaser of the

note before maturity, and for value, and that the name of Quigley was indorsed on the note.

The court instructed the jury, on the part of plaintiff, in substance, that if the note was left with Clark for collection only, and without plaintiff's indorsement, and Clark, without authority from plaintiff, indorsed the name of the latter on the note and sold the same to the bank, and afterward the latter collected the note and never paid the proceeds to plaintiff, then the jury should find for the plaintiff, although they should believe from the evidence that the bank was ignorant respecting such unauthorized indorsement, and purchased the note in good faith for a full consideration and before maturity.

The instructions in behalf of the bank were to the effect that if the note was purchased by it, in good faith and for a valuable consideration of Clark, and the note at the time of the purchase was indorsed either by the plaintiff, or by his authority, the finding should be for the defendant, even though the evidence showed that Clark had no authority to sell the note. And the third instruction for the defendant told the jury that the burden of proof was on the plaintiff to show, by a preponderance of evidence, that the indorsement of Quigley's name was a forgery. These instructions put the case very fairly to the jury. Perhaps the last instruction went further than the law warrants, but as the judgment went in favor of plaintiff it is unnecessary to comment on any supposed error which it may contain.

Where a principal clothes his agent with apparent title to a negotiable security, as *ex. gr.*, by indorsing such a note in blank, and the agent contrary to the commands of his principal negotiates the note to one who purchases in good faith before maturity and for a valuable consideration, the act of the agent, though wholly unauthorized, will bind the principal as effectually as if no defect of authority existed. Story Agency, § 443. For in such cases where one of two innocent persons must suffer, the one must be the sufferer who gave occasion to the commission of the wrong. *Id.*

But if the testimony offered on behalf of the plaintiff be true, Clark had neither real nor apparent authority to transfer the note. If the indorsement was a forgery, the case stands here as if the instrument bore no indorsement at all. An attorney who receives a note merely for collection has no authority to make any other disposition of it. *Goodfellow v. Landis*, 36 Mo. 168; *Smith v. Johnson*,

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71 id. 383. So that taking the testimony offered by the plaintiff as true, the bank bought the note from one not authorized to sell it, and from one not possessing an apparent title. When a note payable "to order" is not indorsed by the payee, the transferee does not acquire the legal but only the equitable title (1 Dan. Neg. Inst., §§ 664 a, 741); and the transferee takes it as a new chose in action, and must aver and prove the consideration, and takes it subject to all the equities which attached to it in the hands of his transferor. *Id*; *Boeka v. Nuella*, 28 Mo. 180. And though under our code the transferee may maintain an action on the note in his own name, where the transfer occurs by mere delivery, this ability to sue in his own name cannot confer on him the rights or the status of him who has purchased an instrument transferable by mere delivery, or one payable to an order and indorsed in blank. 1 Dan. Neg. Inst., *supra*; *id.*, §§ 321, 573. In short such purchaser is not to be regarded as an indorser in the usual course of business. *Id.*, §§ 621, 781, a. For these reasons the instructions on which we have commented furnish the defendant no just ground for complaint.

[Omitting minor questions.]

For these reasons the judgment should be affirmed.

Judgment affirmed.

All concur.

HEATH V. GOSLIN.

(80 Mo. 510.)

Contract — Liability of voluntary association.

The members of a voluntary association for educational purposes are personally liable for the wages of a teacher hired by the acting president of the association. (*See note*, p. 510.)

ACTION for wages. The opinion states the case. The plaintiff had judgment below.

T. C. Dungan, for himself, and *T. H. Parrish*, for appellants.

James Lairbird, for respondent.

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PHILIP, C. It appears from the pleadings and proofs that in 1874 the defendant Goslin, who was connected with the public schools of the town of Oregon in Holt county, and the other defendants and citizens of said town, conceived the project of establishing, in connection with the public school system of the community, a high grade school after the fashion of a normal school, to be known as the "North-west Missouri Normal School." To that end a public meeting of the citizens was called, and measures were inaugurated to accomplish the purpose. Defendant Goslin, as principal of the public school, was to have charge of the Normal department. As a means of raising the necessary funds for its conduct, the tuition was fixed at \$30. A public subscription was to be made of \$30 by each subscriber, to be held and used as a guaranty fund, subject to assessment to pay any deficit consequent upon a failure to realize from patronage a fund sufficient to defray the expenses of running the normal department, added to which the school board of the public school furnished \$1,000 per year out of the public funds, and the use of the public building, fuel, etc.

The defendants were appointed a committee, known as "The Board of Regents," to take charge of the school and conduct its affairs.

The school was opened and conducted for the years 1877, 1878, and 1879. The plaintiff was employed by defendants, as such board, for the years 1877 and 1878 as a teacher, and paid by them. For the term to begin September, 1878, ending June, 1879, Goslin, as president of the board, applied to the plaintiff to renew the engagement with her as teacher for that term. They had paid her \$800 the year before. Goslin tried to get her to take less for the year in question. She declined, and thereupon he engaged her on the part of the board at the sum of \$800. She rendered the service accordingly. The board paid her \$400 in money for the first and second quarters, and for the third and fourth quarters they gave her orders, signed by defendant Goslin, as president, and the defendant Hawkins, as secretary, on the treasurer for \$200 each, on which they made payments, leaving a balance of \$298.85, and interest unpaid. To recover this sum this suit is brought.

The court sitting as a jury, found for the plaintiff, and rendered judgment accordingly. The defendants have appealed:

1. The contention of the defendants chiefly is that the contract in question was not a personal undertaking on their part, but they

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were acting for the public, and the plaintiff rendered the service depending upon the fund that might come from the sources indicated in the foregoing statement.

The controlling question then is, to whom did the plaintiff give the credit, and whom did the defendant understand her to be crediting? If as a matter of fact, it was so understood by both parties as to become a part of the contract that the so-called board of regents were not to be responsible in any event to this teacher for her agreed wages, they would not be bound, although there was no responsible principal behind them. Enough is shown by the record to conclude that the plaintiff, when she performed the service, knew the origin of this school, and the source from which the board expected its pecuniary sustenance. It is also true that she testified she did not expect the defendants individually to pay her. But she further testified, to what would seem to be the plain, common-sense idea all the parties must have entertained, that she was employed by the board, and "expected the board — the defendants — would provide the means with which to pay me; I had nothing to do with the matter of raising the money; I did not agree to look to any particular fund or source for funds; the board hired me and agreed to pay me; I supposed they would raise the money in some way; I did not agree to take any pay, or rely on any contingent fund or any thing of the sort; they employed me and agreed to pay me, and I looked to them for pay, and not to anybody else or any particular fund."

There were other facts in evidence too, which in our opinion entitled the plaintiff to have the issue submitted to the jury as to whether the defendants were personally answerable. Prior to this year in question the defendants had employed the plaintiff and paid her as a board. The contract had for one year been reduced to writing, and it seems to have been the purpose and desire of both parties to reduce it to writing for this year. It was delayed and neglected. The secretary of the board drew up and signed the contract, but it was not completed by receiving the signatures of all the parties.

One or two of these defendants make the point that they did not authorize the acting president of the board to make the contract, and one of them claims, that notwithstanding the minutes of the meeting kept by the secretary show he was present, in fact he was not present when the contract was drawn up and warrants is-

sued to plaintiff on account of her salary. Pretermittting any discussion of the question raised as to whether this being a voluntary association, and not a body corporate, the minutes kept by the acting secretary are competent evidence against one not present and assenting thereto, there is ample in the case to submit to the jury from which the knowledge and co-operation of all the defendants might be justly inferred. They were the acting board, intrusted with the management of the school. They had been for years employing and paying this woman. They knew she was continuing to teach and being paid out of the funds. They had not withdrawn from their self-imposed office as a managing board.

This precise question was presented in *Doubleday v. Muskett*, 7 Bing. 110. The defendants there consented to become directors, and attended meetings as such, of a projected water company, for which an act of Parliament was to be obtained for its incorporation. The defendants, after attending one or more meetings, failed to appear further. It was held, although no act of Parliament was had, and the project failed, they were responsible for works ordered at subsequent meetings of the projectors which they did not attend, having done no act to divest themselves of their character as parties concerned in the movement. To whom did or could the plaintiff in the case at bar look for pay but to the parties employing her? Whom could she have sued but them? Back of them was no responsible principal. The people of the community, in whose interest the board now claim they were acting, were inaccessible. As was said by SHERWOOD, J., in *Blakely v. Bennecke*, 49 Mo. 195: "He was personally chargeable even on his own showing * * * unless he had disclosed a responsible principal. But in this case there was no principal, either responsible or otherwise, to disclose. Company "I" was incapable of suing or being sued; it possessed none of the elements or attributes of a legal entity."

Indeed it cannot be affirmed that the intangible public authorized this board to employ the plaintiff. The mass meeting simply devised a plan by which they hoped the project would succeed. They promised nothing. The individuals who should subscribe to the fund merely bound themselves to the extent of their individual subscription, and no further. The board of regents accepted the tendered office of managers, and undertook to conduct its affairs, relying upon tuitions, subscriptions and the \$1,000 annuity from

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the public school fund to meet its expenditures. They, and not the plaintiff, are the parties to raise this fund. And if they discovered they could not succeed it was their plain duty to have advised their employee of the fact, so that if she continued it would have been at the risk of procuring the funds for her payment from another source than the individual liability of the board. Had the people subscribed a certain sum to promote the project, to be paid annually, or otherwise, and the defendants had engaged the plaintiff with the understanding that they were the mere agents of this public body to disburse the fund subscribed, she could not have held them personally bound. *Tobey v. Clafin*, 3 Sumn. 379; *Parrott v. Eyre*, 10 Bing. 282; *Story Agency*, 287. On the other hand it is well settled that although a party may be a mere agent, and known to be such, yet if he contracts in his own name, or in his name as agent when his principal is incapable of contracting, or is irresponsible, the law presumes he intended to bind himself. *Story Agency*, §§ 281, 282.

The justice of this rule rests on the principle that otherwise the party performing the service would be remediless. If the agent, in such case, would stand exonerated, he must disclose a responsible principal. *Lapeley v. McKinstry*, 38 Mo. 245, and the authorities therein cited.

In *Horsley v. Bell*, 1 Brown Ch. 101, it was held, that even where certain persons were appointed commissioners under an act of Parliament for making a river navigable, with power to raise money on tolls for work being done, and the commissioners declined paying for this work upon the ground that no funds were left, the commissioners were personally bound upon the ground that the credit was given to them. So in *Cullen v. Duke of Queensberry*, 1 Brown Ch. 101, it was held that where the committee of a voluntary society entered as such into a contract with tradesmen for business to be done on behalf of the society, the funds proving insufficient, all the acting committee were personally answerable, on the ground that the credit must fairly be presumed to be given to them rather than to the subscribers at large.

The case of *Tutt v. Hobbs*, 17 Mo. 486, is not parallel. There the trustees were acting *virtute officii*, and contracted as such under the law of their creation. Back of them was a responsible principal. Their duties were prescribed by law, and Tutt knew that the fund to which he could alone look for pay was provided by law, and the

trustees and commissioner were the mere agents of the law for its proper disbursement.

[Omitting other points.]

It follows that the judgment of the Circuit Court is affirmed.

Judgment affirmed.

All concur.

NOTE BY THE REPORTER.—A voluntary association was formed for the encouragement of pigeon-breeding. A public exhibition was held, which though not specifically authorized by the constitution or by laws of the association, was not inconsistent with its objects. *Held*, that members who participated in a vote authorizing expenses to be incurred for the purposes of the exhibition, or who assented to be bound by such vote, might be charged in equity with their share of such expenses, at the suit of those members who had paid them. *Ray v. Powers*, 184 Mass. 22. But in *Volger v. Ray*, 181 Mass. 439 an action in regard to the same association, it was held, that a member was not liable for a debt incurred by the committee, unless it appeared that he was present at the appointment of the committee, and that the committee was authorized to incur the debt.

BURKE V. ADAMS.

(80 Mo. 504.)

Deed — delivery by recording.

The grantor's recording of a deed expressing the receipt of the purchase-money is *prima facie* a valid delivery.*

EJECTMENT. The head-note states the point. The plaintiff had judgment below.

E. J. Smith and *W. S. Shirk*, for appellant.

Rice & Walker, for respondent.

PHILLIPS, C. [Omitting other points.] It is chiefly on the testimony of this witness that the point is made by appellant's counsel, that there was no delivery of the deed made by W. H. Burke to Thomas Burke. What constitutes a delivery of a deed is often

* See *Union Mut. Ins. Co. v. Campbell* (95 Ill. 267), 35 Am. Rep. 166.

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a mixed question of law and fact. An arbitrary rule ought not to be laid down. Each case must stand more or less on its peculiar facts. The intent to convey is evidenced by the act of making out and duly executing and acknowledging a deed. The delivery may be evidenced by any act of the grantor by which the control, or dominion, or use of the deed is made available to the grantee. It is not necessary it should be handed over actually to the grantee, or to any other person for him. It may be delivered under certain circumstances, though it remain in the possession of the maker. Where however there is not an actual transfer from the grantor to the grantee, it should affirmatively appear from the circumstances, acts or words of the parties, that the intention to pass the title really existed.

In *Jackson v. Phipps*, 12 Johns. 421, Judge SPENCER said: "This delivery must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing; or it may be both; but by one or both of these it must be made; for otherwise, though it be never so well sealed and written, yet is the deed of no force."

In *Burt v. Cassety*, 12 Ala. 734, it was held that where A. had a deed drawn, and either by his attorney, or in person, carried it to the recorder to be recorded, that was a sufficient delivery, although the deed was not in fact recorded. The court say: "In our judgment these facts clearly establish a delivery of the deed. It is of no importance whatever that the vendee was not present when the deed was made. She is presumed to assent to it as the deed was for her benefit." The Supreme Court of Pennsylvania very properly, as I conceive, hold that while the recording of the deed is not absolutely conclusive of the fact of delivery it is evidence thereof and an assurance by the grantor of the title in the grantee. *Blight v. Schenck*, 10 Penn. St. 289. The countervailing proof therefore that the recording was not designed as a delivery should be clear and persuasive in the instance where the grant was against the interest of the grantor, as where the receipt of the purchase-money is acknowledged in the deed. In an early decision our Supreme Court held that the recording of a deed did away with the old common-law livery of seisin. *Perry v. Price*, 1 Mo. 555.

In *Ayres v. Hayes*, 13 Mo. 252, it was held that a deed of trust recorded by the maker without the knowledge of the beneficiary was a substantial delivery. Its acceptance by the *cestui que trust* might

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be presumed because the grant was for his benefit ; and in *Pearce v. Dansforth*, 13 Mo. 360, it was again held that " the delivery of a deed by the grantor for the purpose of having it recorded may under proper concurring circumstances be regarded as a delivery to the grantee." I think, both on authority and reason, that where the deed is duly executed, acknowledged and put to record by the grantor, it is persuasive evidence as against him, especially where the purchase-money is receipted for, that he intended thereby to pass the title ; and the act would constitute the delivery so as to throw the burden on the grantor and his privies to show by clear countervailing evidence that it was not a delivery. In this case the " proper concurring circumstances " are strongly against the pretension that the deed was not delivered. The deed had remained of record for over five years, at the time of the grantee's death, unassailed, the grantor in the meantime stating to his neighbors that he had conveyed the land to his brother and received part of the purchase-money and expected the balance in a short time. Within eight days after his brother died he committed an act of forgery in an effort to get the title out of him and his heirs. The fact that he had the deed in his possession after his brother's death is not important, in view of all the facts in this case. His brother was an illiterate man, they lived together, and his brother died in the house where W. H. Burke lived, leaving a widow and this plaintiff, a mere boy, helpless and at the caprice of this wily uncle. We think the evidence of delivery was fairly submitted and this issue was found for the right party.

On the whole record the judgment was unquestionably for the right party and the judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

All concur.

LEGG V. DUNLEAVY.

(30 Mo. 558.)

Libel — words not actionable.

A written allegation that the plaintiff was supervising architect of a building, and promised and gave to the defendants work on it, for a commission paid him by them, is not actionable in itself.

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LIBEL. The opinion states the case. The defendant had judgment below.

Taylor & Pollard, for appellant.

T. A. & H. M. Post and *C. F. Moulton*, for respondents.

EWING, C. This is an action for libel by the appellant. Judgment in the St. Louis Circuit Court for defendants. Appealed to the St. Louis Court of Appeals where the judgment was affirmed and brought here for review. The judgment of the Circuit Court was affirmed upon the ground that the petition does not state a cause of action. And it will be therefore necessary to set out the petition in full which is as follows: The plaintiff complains and alleges :

1. That the plaintiff, on the 6th day of August, 1879, was and for several years prior thereto, had been and still is an architect and superintendent, and as such was, had been, and still is carrying on the business as architect and superintendent in the city of St. Louis, and State of Missouri; and had always, as such architect and superintendent conducted and demeaned himself with honesty and fidelity, and had never been guilty of any misconduct or malpractice in his said capacity and profession of architect and superintendent. That by reason of said capacity and fidelity, the plaintiff in his capacity of architect and superintendent had on the 6th day of August, 1879, acquired a large and lucrative business in his profession aforesaid, and enjoyed the confidence of the best citizens and business men of the city of St. Louis, and but for the grievances hereafter complained of would still have enjoyed the same.

2. That on or about the 8th day of August, 1879, and on divers other days, thereafter and before the bringing of this suit, the said defendants, in the city of St. Louis, State of Missouri, published and caused to be published, shown and exhibited to divers persons, the following written words concerning the plaintiff, and of and concerning him in his capacity and profession of architect and superintendent, to-wit :

STATE OF MISSOURI, }
City of St. Louis, } ss.

Be it remembered that on this 6th day of August, 1879, person-

ally appeared before me the undersigned, a notary public within and for the city and State aforesaid, duly qualified for a term expiring January 8, 1882, Anthony C. Dunleavy, who being by me duly sworn, on his oath, deposes and says that heretofore, to-wit, on the 1st day of June, 1873, he was a member of the firm of John E. Oxley & Co., doing business in the city of St. Louis; that said firm on said date made a proposition to do the galvanized iron, tin and copper work, on and about a certain public school building in course of erection, at Litchfield, Illinois, of which building one J. B. Legg, of St. Louis, was supervising architect, and the deponent further says that said J. B. Legg promised John E. Oxley, the other member of said firm of John E. Oxley & Co., to give said firm the contract for said work on the building aforesaid, provided the sum of \$200 was paid to him, the said Legg, as commissions by the said firm of John E. Oxley & Co., the said John E. Oxley agreed to pay said amount to said Legg, and informed this deponent of said agreement, and the said sum of \$200 was afterward paid by this deponent to said J. B. Legg according to said agreement, the last payment of \$100 being made by this deponent to J. B. Legg on the 9th day of June, 1873, and further this deponent says not.

A. C. DUNLEAVY.

Sworn and subscribed before me this }
6th day August, A. D. 1879. }

[L. s.] AUGUST AHRENS,

Notary Public, City of St. Louis.

3. That the defendants meant thereby to impress the public with the belief that plaintiff was wholly unworthy of confidence and trust, in said capacity and profession of architect and superintendent, and said publication was so understood to imply, by those to whom the same was published and exhibited as aforesaid.

4. The said publication was false and malicious, and by means thereof plaintiff hath been and is greatly injured, prejudiced in his reputation aforesaid, and has also lost and been deprived of great gain and profit, which would otherwise have accrued to him in his said profession and business of architect and superintendent, to-wit, \$50,000.

Plaintiff says he is damaged in the sum of \$50,000, for which and costs, he demands judgment.

The answer is 1st, a general denial; 2d justification; 3d and 4th, that the publication was privileged. There was judgment for defendant.

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I. The first point made by the respondents is that the petition does not state a cause of action. If this be true it is an end of the case and it will not be necessary to look further into it. As far back as 10 Mo. 648, in the case of *Nelson v. Musgrave*, Judge NARROW quoted with approval the definition of libel from Judge PARSONS in *Commonwealth v. Clapp*, 4 Mass. 168, which is as follows: "A malicious publication expressed either in printing or writing, or by signs or pictures, tending to either blacken the memory of the dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule." This definition was again approved by BLISS, J., in *Price v. Whitely*, 50 Mo. 439. In what manner does the affidavit of Dunleavy, set out in the petition, blacken the reputation of the plaintiff? It in substance alleges that plaintiff was supervising architect of a certain building and defendants paid him a commission to give defendants the contract for certain work thereon. Suppose that was true, how would it show that plaintiff was degraded or brought into contempt or ridicule? The words to be actionable *per se* "must be such as if true would disqualify him or render him less fit properly to fulfill the duties incident to the special character he has assumed." Towns. Lib. & Sl., § 190—"Words to be actionable on this ground (as disparaging plaintiff in his calling) must touch him in his office, profession or trade." "They must impeach either his skill or knowledge, or his official or professional conduct." Odgers on Lib. & Sl. 65; *Fitzgerald v. Redfield*, 51 Barb. 484. Every false charge is not libellous. It must come within the definition. It must "blacken the memory of the dead or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule." In our opinion the affidavit in this case does neither and is therefore not libellous *per se*.

II. The words set out in the petition not being libellous *per se* and therefore not actionable, it becomes necessary by prefatory averments to set out the extrinsic matter which will render them so *McManus v. Jackson*, 28 Mo. 58. In *Bundy v. Hart*, 46 Mo. 460, BLISS J., says: "Indeed I have never heard the general principle doubted, that where words are charged that are not actionable without a knowledge of some extrinsic fact, it is necessary to set forth that fact by way of preliminary averment." If this is not done there is no cause of action shown. These necessary extrinsic facts being averred must be proven. "Innuendoes are used to so

connect the words charged with the averments as to make the petition a logical and complete statement of the plaintiff's case." The same doctrine is announced in *Curry v. Collins*, 37 Mo. 324; *Church v. Bridgman*, 6 Mo. 190; *Dyer v. Morris*, 4 Mo. 214. Where the words are not actionable in themselves extrinsic facts and matters must be stated which shall render them so. In *Caldwell v. Raymond*, 2 Abb. Pr. 193, the libellous words were "Married, Joseph W. Caldwell to Miss Elizabeth Ehle late of New York" meaning a public prostitute by that name; thereby intending to charge that said plaintiff had been guilty of marrying a prostitute. The court say, "that the publication on its face bore no injurious or defamatory meaning will not be disputed; and it is a well settled rule in pleading in actions of this character that where the words used by the defendant do not of themselves convey the meaning which the plaintiff would attribute to them, and such meaning only results from some extrinsic matter or fact, such extrinsic matter or fact must be alleged in the complaint and proven on the trial." This may not be done by innuendo. It should be by prefatory averments. The rule is uniform that such averments must precede the innuendo. 2 Abb. Pr., *supra*. Townshend Lib. & Slander, § 336; *Christal v. Craig*, 80 Mo. 367. The petition in this case has no averment showing the duties of a supervising architect, nor any allegation by which it is made to appear that those duties are in conflict with his taking commissions from a sub-contractor to aid him in obtaining a sub-contract on the building he is supervising. The nature of the alleged charge is not such that the court may presume that plaintiff's reputation is blackened or that he is thereby exposed "to public hatred, contempt or ridicule." "If this is a libel of plaintiff in his business it is so on account of some extrinsic fact," or some special obligation he was under to his employer. If so, his petition must allege it. The universal rule of pleading is that if the words are not libellous *per se*, the petition must by preliminary averments show extrinsic facts from which the libel results. 2 Abb. Pr., *supra*; *Pollard v. Lyon*, 91 U. S. 225.

This petition does not contain the necessary averments of extrinsic matter, and for these reasons the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

All concur.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

CITY OF GALVESTON v. POSNAINSKY.

(88 Tex. 118.)

Negligence — proximate cause

Where a child fell into an excavation negligently left open on a public sidewalk, and was hurt by striking upon broken glass at the bottom, *held*, that the defect in the sidewalk was the proximate cause of injury.*

ACTION for personal injury by negligence. The head-note states the point. The defendant had judgment below.

Jas. B. Stubbs, for appellant.

Waul Walker and Kilpatrick, for appellee.

STAYTON, A. J. [Omitting other questions.] The court gave the following charge :

6. "If the injury occasioned did not result from the slipping into the ditch alone, but was produced by the accidental lighting upon a broken bottle or other piece of glass or sharp instrument, and thereby the injury was inflicted, the city would not be responsible

*See *Campbell v. City of Stillwater*, post.

for such accidental injury resulting from such a cause if unknown to the city, and such a cause the city should not be expected to know without special notice, or without it had existed so long that by ordinary care it would have been discovered and known."

There were but two possible causes of the injury under the evidence if there was no failure to exercise due care by the plaintiff.

The fall must have resulted from the defective sidewalk or ditch contiguous to it, or from defects in both, and the injury must have resulted from the fall; or the fall so resulting, the plaintiff must have been injured by falling on some substance in the ditch.

Under the other charges given the jury must have found that the plaintiff used due care, and must have found that there was neglect on the part of the city, or their verdict would necessarily have been different.

If there were broken bottles or other pieces of glass or sharp instruments in the ditch, without which the injury notwithstanding the fall would not have resulted, even then though these things could not have proved hurtful without the fall, if the fall was caused by the defective condition of the sidewalk, then it must be deemed the proximate cause of the injury. *Ring v. City of Cohoes*, 77 N. Y. 83; s. c., 33 Am. Rep. 574; *Palmer v. Inhabitants of Andover*, 2 Cush. 601.

If the injury resulted from one of the causes or from the two combined, if such cause would not have existed but for the neglect of the city, then it would be liable if there was no failure on the part of the plaintiff to exercise due care.

This being true, the charge of the court was sufficiently full in this respect, and it was not error to refuse the first instruction asked by the defendant, even if it had presented correct legal propositions.

The charge as asked however in effect contained the proposition that the city would not be responsible if the injury would not have occurred but for the glass or other sharp substance in the drain; and this without reference to whether it was negligence in the city under all the circumstances, to permit the drain to be in that condition.

Affirmed.

WILLIE, C. J., did not sit.

CITY OF GALVESTON V. BARBOUR.

(95 Tex. 172.)

Evidence — declarations — res gesta.

A child died, as alleged, from an injury by a bolt carelessly left projecting from the curb of a city sidewalk. Immediately after the injury he told his mother the cause of the injury, weeping from pain at the time, and the next day he told his father. In an action for damages against the city by the father, the father testified to the son's declaration to him, and that he and the son together went to see the bolt in consequence of the son's declaration, and found drops of blood on it; *held*, that the declaration to the mother was competent, but that to the father incompetent.*

ACTION of damages for death of minor child caused by negligence. The opinion states the point. The plaintiff had judgment below.

Geo. Mason, for appellant.

STAYTON, A. J. [Omitting other points.] There is no direct proof as to how the child received the injury of which it died, but it is contended that he received a wound on his foot from a projecting iron bolt in the sidewalk on one of the streets of the city of Galveston.

John M. Barbour, the father, and one of the plaintiffs, testified over the objections of the appellant, that "next morning he (the father) told him (the son) to come and show the object that had hurt him. From what he said, witness examined a bolt in the curbing of the sidewalk on the west side of Eighteenth street, between post office and Market street, being the first bolt in the curbing next to the alley, and between the alley and Hibbert's store, and found two drops of blood right by the bolt."

The witness then went on to describe the bolt, and stated that it projected above the curbing and had a sharp edge. He further stated that "the boy was with witness when he examined the bolt; witness went there to look at it in consequence of what had occurred between him and his son. The boy was then doing very well."

* See *Waldels v. N. Y., etc., R. Co.* (95 N. Y. 274), 47 Am. Rep. 41; *State v. Horan*, *post*.

City of Galveston v. Barbour.

Mrs. Barbour, the mother, was permitted to state, over the objection of the defendant, that "the boy came in crying, and seemed to be suffering very much with his foot, and said he had hurt it on a screw bolt on the curbing of Hibbert's pavement." This conversation occurred on the same evening the boy received the hurt.

The testimony of the father necessarily had upon the jury all the effect which his statement that his son told him he was injured by the bolt which he examined could have had, if made. The evident intention and purpose, which by the course pursued was fully accomplished, was to get before the jury the declaration of the child as to the manner in which he was injured. If the father, under the circumstances, could not legally have been permitted to narrate before the jury what his son had told him, then his testimony which was intended to have, and must have had, with the jury the same effect, ought not to have been admitted. Parties cannot do by indirection what they could not do directly.

The father testified to matters which occurred the next day after the child was hurt, and the matters to which he testified could in no sense be termed *res gestæ*.

This testimony was, in effect, a narration of what his son told him as to the cause of the injury which he had received the day before, and should have been so far excluded. 1 Greenl. Ev. 108; Whart. Ev. 261-263; Whart. Cr. Ev. 690, 691; Abb. Tr. Ev. 589; *People v. Davis*, 56 N. Y. 101; *O. & M. R. Co. v. Hammersley*, 28 Ind. 371.

Too great a time elapsed; the statement and acts of the son were not the natural utterances of a simple, truthful child prompted by the suffering endured at the time through the injury; there was too much calculation and method on the part of the father, who then had no reason to believe that the injury was more serious than boys often receive in the most innocent pastime, to make those things to which he testified *res gestæ*. It was simply hearsay, with no feature to relieve it from the operation of the rule which excludes that class of declarations.

The declarations made to the mother by the child were of a different character; he came home immediately after he received the injury, crying, and smarting with pain resulting from it, and child-like and naturally made known to her how he had been hurt; and we may say of his declarations made under such circumstances, as was said by the Supreme Court of Missouri in the case of *Hurriman v. Stowe*, 57 Mo. 97: "The accident and the declarations formed

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connecting circumstances, and in the ordinary affairs of life no one would doubt the truth of those declarations, or hesitate to credit them as evidence." The weight to be given to the mother's testimony and her credibility were questions for the jury.

We think the evidence of the mother was admissible. *Entwhistle v. Feighner*, 60 Mo. 215; *Elkins v. McKean*, 79 Penn. St. 501; *Hart v. Powell*, 18 Ga. 639; *Jordan's case*, 25 Gratt. 945; *Commonwealth v. McPike*, 3 Cush. 181.

The evidence of Mrs. Barbour however did not show that the injury resulted from the neglect of the city, nor identify the instrument through which the hurt was received, and the testimony of Mrs. Hibbert tended to show that the injury was not received through a projecting bolt; and it may be that but for the improper testimony of the father the verdict would have been different.

In cases of this character, to render a municipal corporation liable, there should be evidence showing that it had notice of such defect as caused the injury, for it cannot be presumed that notice of every trifling defect exists. For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

WILLIE, C. J., did not sit.

SCHNEIDER V. SANSON.

(22 Tex. 301.)

Partnership — sale of entire stock — on Sunday.

One partner may sell the entire stock of the firm to pay its debts in good faith,* and may do it on Sunday, it not being in the usual business of sales, and being a work of necessity.

TRIAL of right to merchandise. The opinion states the case.

Poindexter & Padelford, for appellants.

Brown, Ramsey & Crane, for appellee.

*See *Sullivan v. Smith* (15 Neb. 476), 48 Am. Rep. 354.

WATTS, J. COM. APP. This is a proceeding according to the statute, to try the right of property to certain merchandise. Appellants, claiming as creditors of Chapman & Co., caused an attachment sued out against that firm, to be levied upon the property in the possession of appellee Sansom, who claims to have previously purchased the same from J. H. Brown and others, who had purchased from Chapman & Co. The material issues presented by appellants, and contested below, were :

1. That the sale was made by Chapman & Co. to J. H. Brown and others on Sunday ; that they sold to Sansom on the same day ; and for that reason appellants claim that the sale was void, and the property subject to their writ of attachment.

2. That the sale was made by Chapman & Co. for an inadequate consideration, and for the purpose and with the intention to hinder, delay and defraud their creditors, and that this was well known to the purchasers at the time, and also known to Sansom at and before his purchase.

3. That the sale was made by Chapman without the concurrence of the managing partner, Smith, and therefore void, and the property subject to the writ of attachment.

The court found against appellants upon each of these issues, and it is now claimed that these findings are erroneous.

For the sake of convenience these questions will be considered in reversed order.

Generally each partner may bind the firm by any act or contract that is embraced in the general scope of the partnership business. Each partner is considered generally as the agent of the firm in all matters pertaining to its business, and as such may bind the other partners the same as if he acted under a duly executed power of attorney for that purpose. *McKinney v. Bradbury*, Dallam, 441 ; *Blodgett v. Weed*, 119 Mass. 215 ; *Decker v. Howell*, 42 Cal. 636 ; *Campbell v. Dent*, 54 Mo. 325 ; *Pahlman v. Taylor*, 75 Ill. 629 ; *Kenney v. Altwater*, 77 Penn. St. 34.

It is also well settled that one partner has the authority and may sell the whole or any part of the assets of the firm in the regular course of business, or for the purpose of paying the debts of the firm, where there is no fraud in the sale. *Graser v. Stellwagen*, 25 N. Y. 315 ; *Williams v. Barnett*, 10 Kans. 455 ; *Halstead v. Shepard*, 23 Ala. 558 ; *Cayton v. Hardy*, 27 Mo. 536 ; *Arnold v. Brown*, 24 Pick. 89 ; *Lamb v. Durant*, 12 Mass. 54.

Nevertheless one partner cannot use the partnership property, either in whole or in part, in the payment of his individual debts, unless it is done with the assent, either expressed or implied, of the other members of the firm. *Buck v. Mosley*, 24 Miss. 170; *Rogers v. Batchelor*, 12 Pet. 221; *Sauntry v. Dunlap*, 12 Wis. 364.

But as has been already shown, he may sell the partnership effects in whole or in part in the payment of partnership debts, without the assent of the other partners, provided that the sale is not tainted with fraud.

Here, Chapman alone was present, and as is claimed, made a *bona fide* sale of the property in payment of partnership debts, for the purpose of avoiding a sacrifice of the property by levy of the attachment. It seems that Smith, the other partner, has acquiesced in the sale; at least it does not appear that any complaint was made by him. Hence the conclusion is reached that Chapman had the right to make the sale for the purpose claimed, provided that it was in no way tainted by fraud.

And that is the next question for consideration.

[Omitting it.]

But it is earnestly insisted, that as the sale and delivery both to Brown and others, and by them to Sansom, was made upon Sunday, the transaction was therefore inhibited by law, and consequently void in that sense of the term that subjects the property to the writ of attachment.

If it should be conceded that this transaction came within the statutory inhibition, it by no means follows that it would be void in that broad signification or sense of that term urged by the appellants. It clearly appears that the contract was entirely executed on the day of the sale, i. e., the property was delivered and the consideration paid by the cancellation and delivery of the evidences of Chapman & Co.'s indebtedness. Such being the case, in the absence of fraud in the sale, the title vested in Brown and others, Chapman & Co. could not maintain an action for the recovery of the property; all their right passed by the sale and delivery, and as appellants had no other or greater right to the property than Chapman & Co. had, they could not, as creditors of the latter, in the absence of fraud in the sale, maintain an action for its recovery that could not be maintained by Chapman & Co. That is the transaction would not be absolutely void under all circumstances and for all purposes, but would only be void to the extent of depriving the parties of any

right of action based upon it. For instance, Chapman & Co. could not have maintained an action for the purchase-money or consideration, had it not been paid; neither could Brown and others, for a rescission of the contract or for damages, on account of fraud in the sale. *Smith v. Bean*, 15 N. H. 578; *Horton v. Buffinton*, 105 Mass. 400; *Moore v. Kendall*, 2 Wis. (Pinney), 104; Benj. Sales (1st ed.), 416.

The inhibitions against engaging in secular avocations on Sunday, which could have the remotest bearing upon the question before us, are embraced in arts. 183 and 186 of the Criminal Code; the first provides that: "Any person who shall hereafter labor, or compel, force or oblige his employees, workmen or apprentices to labor on Sunday, shall be fined not less than ten nor more than fifty dollars."

Among the numerous exceptions from the operation of that article are works of necessity and charity. The other article is that: "Any merchant, grocer or dealer in wares or merchandise, or trader in any lawful business whatsoever, who shall barter or sell on Sunday, shall be fined not less than twenty nor more than fifty dollars," etc. This article had for its special object, the prevention of traders from pursuing their usual business of barter and sale, and thereby promote a proper respect for the sanctity of that day, dedicated, as it should be, to rest, contemplation and worship.

Our civil statutes provide that writs of attachment, etc., may be issued and levied on Sunday. In this case, the writs of attachment had been issued and were then in the hands of the officer for levy. To avoid the levy and consequent sacrifice of the property, it is not believed that any one would contend that Chapman & Co., if they had the money could not have lawfully paid off and discharged the indebtedness on Sunday. And no difference upon principle is perceived between a payment in money and a payment in property, in this respect. Either would be a work of necessity under the circumstances. And neither would be included in the spirit and intention of the two articles quoted above from the Criminal Code.

Our conclusion is that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

INTERNATIONAL G. N. RAILWAY COMPANY v. HASSELL.

(83 Tex. 256.)

Carrier — railroad — passenger on wrong train — ejection.

The plaintiff at Jacksonville bought a ticket on the defendant's railway to Elkhart, and entered a train pointed out to him by the ticket seller. The conductor accepted the ticket, but immediately notified him that the train did not stop at Elkhart, and that he could get off at Palestine and there resume his journey for Elkhart. He refused to get off and was ejected. *Held*, proper. (*See note*, p. 527.)

ACTION for damages for personal injuries by wrongful ejection from a railroad train. The opinion states the case. The plaintiff had judgment below.

John Young Gooch, for appellant.

Word & Glenn, for appellee.

STAYTON, A. J. In so far as it was necessary to do so, the charge of the court below clearly informed the jury as to the rights of the respective parties on each ground of action embraced in the petition.

One ground of action was the failure of the appellant to carry the appellee from Jacksonville to Elkhart on the train on which he started from the former place.

The other ground of action was that the conductor ejected the appellee from the train on which he left Jacksonville, in an improper manner, from which he alleged injury.

Under the uncontroverted facts presented by the record it does not become necessary to determine whether the contract made between the appellee and the person who was acting as ticket agent in the appellant's office at Jacksonville was binding on the appellant or not. To that person the cost of passage to Elkhart was paid, and the appellee received in good faith a ticket from him, which on its face was good, and entitled him to be carried from Jacksonville to Elkhart. After paying for and receiving a ticket, bearing the signature of the proper officer of the company, in good faith he entered the car of the appellant, believing, as he had been told by the person who sold him the ticket, that on that train he could go to Elkhart.

After he entered the train and the journey began, the conductor recognized the validity of the ticket which he held, by receiving it as an evidence that the holder of it was entitled to and had commenced a journey paid for and evidenced by it. These facts made the appellee a passenger on the appellant's train, and not a mere intruder or trespasser. Such would have been his character if he had held no ticket at all, if he entered the car of the appellant in good faith intending to make the journey and to pay his passage.

The court instructed the jury, among other matters, as follows:

"The proof shows that the railroad company runs two daily trains between points named in plaintiff's ticket, and the regulation that one of these trains shall not stop at all stations is a reasonable regulation and one they had a right to make, and a passenger who travels on said road with notice of such regulation cannot get on a through train and demand to be carried to a point at which said through train does not stop, even if he has a ticket to such point, unless he goes on the train by direction of the railroad's agents. If the person who acted as agent, and sold the ticket, directed the plaintiff to get on the through train, he had the right to get on said train and travel upon it; but if after getting on he was, at a regular station, notified that the train would not stop at Elkhart, it was his duty then to get off and take the proper train; for if the railroad agent at Jacksonville make a mistake, the railroad had a right to correct the mistake at any regular stopping station for that train. If then he was informed at Palestine of the mistake, it was his duty to get off, and if he did not do so, the conductor had a right to put him off in a proper manner."

There was no question made as to the right of appellee to a passage on the other train, from Jacksonville to Elkhart, on the ticket which he held,—that right was recognized.

Under the facts of the case we believe that the charge of the court correctly presented the law of the case; and that in so far as it made the right of the appellee, in any respect, to depend upon the act of the person who was in the ticket office of appellant, assuming to discharge the duties of its agent, and from whom he purchased the ticket on which he was traveling, even if incorrect, could not have prejudiced the appellant; for the uncontroverted facts showed that the appellee was informed at Palestine that the train on which he was, under the regulations of the road, would not

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stop at Elkhart, and that the following train would, and that he was requested to wait for that train.

The jury was also fairly instructed, under such a state of facts, that it was not thereafter wrongful to eject the appellee from the train, if this was done in a proper manner.

[Omitting other questions.]

Judgment affirmed.

NOTE BY THE REPORTER.—In *Platt v. Chicago & Northwestern R. Co.*, Supreme Court of Wisconsin, April 28, 1885, it was held that it is the duty of a passenger to ascertain whether the train he is about to take will carry him and put him off at his destination, and in this regard he is bound by the rules and regulations of the road. The court said: "The plaintiff's right to recover in this action depends upon the question whether the companies were bound to carry her to her destination, at Wonewoc, on the same train which carried her from St. Paul to Elroy. If they were, then she would be entitled to recover such damages as she sustained by being compelled to leave the train at Elroy, and remain there until the next train in the morning, which carried her to her destination. If they were not so bound, then she would not be entitled to recover any sum against either company. The jury, in their special verdict, find among other things, 1, 'that the train which carried the plaintiff from St. Paul to Elroy did not ordinarily stop at Wonewoc;' and 2, 'that it did some times stop at Wonewoc for the purpose of letting off passengers.' Although the court excluded evidence offered by the defendants to show that this train, according to the regulations, was not in the schedule of accommodation trains, and that there were two trains run, daily, stopping at all stations on the road, it seems to us that was furnishing reasonable accommodation for persons travelling to and from the smaller towns on the line of the road. That regulations of the kind made by the defendant companies are reasonable, and should be upheld by the courts, is fully established by the authorities. *R. Co. v. Randolph*, 58 Ill. 510; s. c., 5 Am. Rep. 60; *R. Co. v. Nuzum*, 60 Ind. 141; s. c., 19 Am. Rep. 708; *R. Co. v. Applewhite*, 53 Ind. 540; *R. Co. v. Hatton*, 60 Ind. 12; *Dietrich v. R. Co.*, 71 Penn. St. 482; s. c., 10 Am. Rep. 711; *Johnson v. R. Co.*, 46 N. H. 213; *Cheney v. R. Co.*, 11 Metc. 121; *R. Co. v. Proctor*, 1 Allen, 267; *Pink v. Railway Co.*, 4 Lans. 147; *R. Co. v. Bartram*, 11 Ohio St. 457; *Yorton v. Railway Co.*, 54 Wis. 234; s. c., 41 Am. Rep. 23. The rule is clearly and briefly expressed by the court in *R. Co. v. Randolph*, *supra*. 'By his ticket a passenger acquires only the right to be carried according to the custom of the road; he has the right to go to the place for which his ticket calls on any train that usually carries passengers to that place, but he cannot insist on being carried out of the customary course of the road.' It is also held that it is the duty of the passenger to ascertain for himself whether the train upon which he takes passage will carry him and put him off at the destination to which he wishes to be carried. See cases above cited. Some of the cases hold that 'it is the duty of the conductor to run the trains according to public arrangements, and he has no power to change them, and a passenger

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has no right to infer that a conductor has any such power from his general duties as a conductor, and no reason to suppose that he can bind the railroad company by any such agreement.' *R. Co. v. Hatton*, and *R. Co. v. Applewhite*, *supra*. In order to entitle the plaintiff to recover damages in this action, it was incumbent on her to prove that she had either, by express contract with some employee or agent of the companies, authorized to make the same, or according to the rules and regulations of the companies, the right to be carried from St. Paul to Wonewoc on the same train on which she took passage at St. Paul. This we think she failed to prove upon the trial. The jury have found that the train on which she took passage did not ordinarily stop at Wonewoc, and the proof given on the trial, that it had before that time occasionally stopped there to permit passengers to leave the cars there, did not estop the company from running its train in the ordinary way, and make it its duty to stop on this occasion; and as there was no proof tending to show that the ticket agent, or any other agent of the company, had either agreed with the plaintiff that it would stop there, or done any thing which can be reasonably construed into an implied agreement to carry her to that place on that train, she failed to establish a cause of action against either of the companies."

In *Pennington v. Philadelphia, etc., R. Co.*, 62 Md. 95, an excursion ticket conditioned "to be used within three days," was held not available afterward, although the ticket agent had informed the buyer that it was "good until used." The court said: "It is true, he pays his fare before he received the ticket, but if he has been misled or misinformed by the seller of the ticket, as to its terms, he has a right to return the ticket and receive back his money. The railroad company agrees to carry him at the reduced rate, upon the conditions stated on the face of his ticket; if he agrees to those terms the contract is consummated; but he cannot take advantage of the reduction of the rate and reject the terms on which alone the reduction was made."

In *Johnson v. Philadelphia, etc., R. Co.*, 63 Md. 106, it was held that if a passenger travelling on an excursion ticket conditioned to be good "only for a continuous trip," and "not good to stop off," on his return knowingly takes a train which does not go as far as the station at which he purchased his ticket, and with the intention of stopping off at an intermediate station, the officers of the company are justified in refusing to accept the return coupon of the ticket for his fare, and in putting him off the train on his refusal to pay the regular fare demanded, or to produce a proper ticket to the station he intended to stop at, and it is no excuse for his refusal, that he went to one of the gate-keepers at the station where he took the train, who examined his ticket and negligently assigned him to the wrong train. The court said. "All that need be said of such an excuse is, that while it is similar, it is not so strong, as that which was relied on without avail in *Pennington's* case. There the agent who sold the ticket told the plaintiff that it was 'good until used,' and to that our reply was, that there was no evidence that the ticket-agent was authorized to make, or to vary the terms of contracts for the company, and our reply here is, that there is no averment in these replications that the gate-keepers had any such authority or power. In that case there was proof that the plaintiff did not actually read his ticket, but there is no averment to that effect in behalf of the

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plaintiff in this case, and it would not have availed him if he had made it. He cannot get rid of the conditions of his contract by saying that he relied upon the actual or implied direction to take his train which was given, either through the belief of the gate keeper that the ticket was good for the train, or through his negligence, ignorance, or mistake. The contract could not be varied by any such direction."

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TERRY.

(82 Tex. 380.)

Damages — proximate cause.

Where a railway company carried a passenger past his destination, and put him off at a water-tank, in inclement weather, and he contracted pneumonia in consequence of the exposure, *held*, that the pain, expense and business detriment resulting therefrom were proper items of damage.*

ACTION for wrongful ejection from railroad train. The opinion states the point. The plaintiff had judgment below.

Davis & Beall, for appellant.

E. L. Antony, for appellee.

WEST, A. J. Time will not permit of our entering into an extended consideration, discussion and comparison of the many authorities bearing on the interesting question now before us, with a view of determining with entire precision what under the facts of this particular case is the true rule by which the jury should be guided in ascertaining the amount of damage (if any) sustained by the appellee for which the appellant is legally answerable.

We have however given the case a great deal of consideration, and have examined very carefully all the authorities on the subject that we have access to at this point.

* See *Cincinnati, etc., R. Co v. Eaton* (94 Ind. 474), 48 Am. Rep 179.

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In this investigation we have been greatly aided by the carefully prepared brief of the able and experienced counsel representing the appellant.

We must however under the circumstances content ourselves in disposing of the questions raised by the assignment of error, with stating that we believe the District Court committed no serious error in holding that the pleadings of appellee, as finally amended, presented in substance in a sufficiently intelligible manner (though not as clearly and distinctly as should have been done), a good cause of action against the appellant for the damages claimed.

The charge of the court, taken as a whole, cannot be said to be erroneous, and fairly enough presented to the consideration of the jury the main issues in the case. Nor was there error in refusing the instructions asked by the appellant, under the facts and circumstances of the case as developed by the evidence.

In the examination of the questions raised, much attention has been given to the case of *Hobbs v. L. & S. W. R. Co.*, 10 L. R., Q. B. 111, and also to the case of *Indianapolis, etc., R. Co. v. Birney*, 71 Ill. 391. The well considered case of *Walsh v. Chicago, M. & St. Paul R. Co.*, 42 Wis. 23-28, as well as other kindred authorities bearing directly on the immediate question under consideration, have also been examined.

Much attention has also been given to the discussion of the rule in *Hadley v. Baxendale*, 9 Exch. 341; 26 Eng. L. & E. R. 398. See 1 Sedg. Meas. Dam. (7th ed.), 122 and 218 to 230 *et seq.*

As before stated, after as full and as careful a consideration of the subject as we have been able to give it, we have come to the conclusion that the English rule laid down in the above cases and others following them is too narrow and restricted, and that a more liberal one, in estimating the damages in this class of cases, should be applied.

We believe that in cases of the character now under consideration the just and proper rule is: that the appellant having unquestionably violated its contract of carriage with the appellee, should be held responsible in damages to him for the discomfort, inconvenience, sickness, expenses, costs and charges which are shown by the proof in this case to have been the direct and proximate, natural and probable result of the appellant's breach of duty.

In this view of the subject we are fully sustained by the following cases: *Brown v. Chicago, etc., R. Co.*, 54 Wis. 343; a. c., 41 Am.

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Rep. 41; *Klein v. Jewett*, 26 N. J. Eq. 474; *Matteson v. N. Y., etc., R. Co.*, 62 Barb. 364; *Memphis, etc., R. Co., v. Whitfield*, 44 Miss. 466; s. c., 7 Am. Rep. 699; *Spicer v. Chicago & N. W. R. Co.*, 29 Wis. 580; *Heirn v. McCaughan*, 32 Miss. 17; *Weed v. Panama R. Co.*, 17 N. Y. 363.

To these many other cases could be added to the same effect.

In the recent work of Sutherland on Damages, vol. 1, pp. 78, 102, 103, published during the present year (1884), the author, after discussing the rule as to the measure of damages in cases like the one now under consideration, and reviewing the more recent authorities, states that the rule laid down in the case of *Hobbs v. L. & S. W. R. Co.*, cited above, is considered now, at this day, "too strict" to be applied in cases like the present. He also, in this connection, criticises very properly the views announced in that case as to what are "secondary consequences," and what matters may be properly considered as "the result of the breach" of the contract of carriage.

After reviewing quite fully the more recent authorities, he announces, as gathered from their consideration, the better rule to be: That in this class of cases where the sickness or injury, or discomfort is the direct or the proximate consequence of the wrongful act, the resulting pain and suffering are also elements of the injury, for which compensation may be rightfully demanded.

On this same subject also, Field, in the revised edition of his work on Damages, p. 343, observes: "Where there was an agreement to take a passenger at a certain point, and a failure on the part of the carrier to stop at that point, and in consequence thereof the passenger suffered great bodily exposure, these facts may be shown in aggravation of the damages sustained."

In this connection too the case of *Williams v. Vanderbilt*, 28 N. Y. 217, may also be examined, and will be found to fully sustain the views here expressed, as applicable to the class of cases like the one now under consideration.

This question, too, has been carefully considered by our own Court of Appeals, and the rule as to the measure and elements of damage in this character of suit was laid down by them very clearly, in accordance with the above cited authorities, and in harmony with the views herein expressed on that subject. See the interesting case of *H. & Tex. C. R. Co. v. Rand*, Tex. Ct. App., W. & W. Civil Cases, § 255.

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Under all the circumstances and facts of this case, as before stated, we are of the opinion that the pleadings of the appellee, as finally amended, set forth fairly enough a good cause of action, and a proper case for the character of damages demanded.

[Omitting minor points.]

The judgment of the District Court is affirmed.

Judgment affirmed.

 TEXAS AND PACIFIC RAILWAY COMPANY V. BOND.

(88 Tex. 442.)

Carrier — ejection of passengers — offer of customary fare.

A passenger on a railway train gave to the conductor the fare which he had been accustomed to pay, and the conductor demanded a further sum as due because the passenger had no ticket. This was refused, and the conductor stopped the train. Then the passenger tendered the additional sum, but the conductor refused it, and ejected him. *Held*, an unlawful ejection, unless the passenger's conduct was willful.*

ACTION for unlawful ejection from a railway train. The opinion states the case. The plaintiff had judgment below.

Leake & Henry, for appellant.

Manion & Adams and *J. O. Terrell*, for appellee.

WILLIE, O. J. The first proposition of appellant under his second assignment of errors, viz.: when the fare is paid on the train, a railroad company has the right to charge four cents per mile, is not questioned on the part of appellee's counsel.

The second proposition, which brings in question the refusal of the court to give a special charge asked by counsel for appellant, presents the only point of any importance in this case. The charge asked was as follows :

“That if they find from the evidence that the regular fare between Elmo and Terrell was thirty cents when paid on the train,

* See *Bland v. So. Pac. Ry Co* (55 Cal. 590), 36 Am. Rep. 50.

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and that this was known to plaintiff on the day he was ejected from defendant's train, and further find that the plaintiff only offered to pay twenty cents for such fare, when applied to by the conductor, and showed an unwillingness to pay the regular fare of thirty cents, and told the conductor that he had better put him off, and that thereupon the conductor pulled the rope to stop the train, before he was aware that plaintiff had proposed to pay the extra ten cents. and that at the time the tender of the extra fare was made (the train) had come to a halt, or was stopping at the instance of the conductor, then the plaintiff had no legal right to tender said extra ten cents and continue his journey after he had shown such unwillingness to pay said extra fare, and after he had told the conductor to stop his train and put him off; that it is too late to offer to pay fare after the conductor has taken steps to stop the train where a passenger has refused to pay full fare."

It will be observed that this charge, taken as a whole, makes the unwillingness of a passenger to pay regular fare, coupled with the remark that the conductor had better put him off, amount to a refusal to pay his passage money. It further gives the railroad company the right to eject the passenger, under such circumstances, even if he offers to pay before the train halts, provided, the conductor has taken steps for stopping it.

It is undoubtedly a general principle that "a willful refusal to pay the proper fare justifies expulsion from the train." *Thomp. Car.*, p. 640. The authorities seem to hold also that "after a person has refused to pay his fare, and is being put off the train, he acquires no right to passage by then tendering the fare demanded." *Id.*; *O'Brien v. Bost. & War. R. Co.*, 15 Gray, 20; *Hoffbauer v. D. & N. W. R. Co.*, 52 Iowa, 342; s. c., 35 Am. Rep. 278. To bring a case within these principles there must be a willful, or at least a positive refusal to pay proper fare, or in other words a boarding or remaining upon the train with the intention of defrauding the company or resisting demands for the payment of fare. *Thomp. Car.* 640.

The distinction between such a case and the present is very apparent. Bond did not enter the car with intent to defraud the company or resist its demands for full pay. He went aboard of it expecting that he would be taken to Terrell for twenty cents, paid to the conductor as usual. He tendered that amount to the conductor in charge — with whom he had never travelled before — and

upon being required to pay ten cents more, told the conductor that he had never been required to pay this additional amount, and when informed that the charge was four cents per mile when paid on the train, objected to paying it and told the conductor good humoredly if he would stop the train he would get off. This was a mere discussion between the parties, in which Bond was endeavoring to persuade the conductor to allow him to make the journey for twenty cents, and the conductor was attempting to convince Bond that he could not do so, but must have the full fare required when paid on the train. It was just such a discussion as is liable to take place frequently between a conductor and a passenger. It may arise as to the validity of a ticket, or the time when it expired or upon like subjects, in which the conductor is expected to see and know the difference between an attempt to impose upon him and a mere mistake of facts on the part of the passenger. The present conductor should have known from the character of his discussion with Bond, the false impression as to what he would have to pay under which the latter boarded the train, and the good humored manner in which he asked to be put off, and the small amount in controversy, and then the great distance which Bond would have to walk if expelled from the cars, that he was no trespasser and that he did not willfully and would not persistently object to paying the fare exacted of him. He should have allowed him a reasonable time to consider as to paying the additional money, and not acted so hastily in pulling the bell and taking steps to eject the appellee from the cars. As he had acted thus hastily, and the appellee had tendered the money immediately upon the rope being pulled — the first evidence he had that the conductor really intended to eject him — the money should have been received and the appellee restored to his rights as a passenger.

However correct the general principles announced in the charge might have been — which we do not decide — the appellee was not entitled to have them applied to the facts in evidence.

The foundation upon which these principles rest, viz., that the passenger is a trespasser and is willfully attempting to obtain passage upon the train in defiance of the rights of the company, does not exist in such a case. A mere discussion of the propriety of making such payment under the circumstances, and raising objections to the demand of the conductor, was not a positive refusal to pay the fare. The conductor, in hastily accepting it as such, acted with-

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out proper consideration, and should not have refused payment when it was offered him immediately upon his taking the first step toward stopping the train. If the court had given the charge as asked, he would have announced it as law, that any display of unwillingness on the part of a person to pay money exacted as fare from him by the conductor, no matter what may have been the manner of that officer nor what the character of the refusal, nor how pleasant may have been the manner of making the suggestion as to putting the passenger off, would authorize his immediate expulsion and cut him off from all right to continue on the train, no matter how soon thereafter he tendered his fare. We cannot accept this as law on general principles, and we know of no case in which it is sustained by the courts.

We prefer the doctrine as laid down in Tennessee, viz.: That the strict rule is confined to willful violations of contract upon proper demand. It will not apply when a passenger has boarded a train under an honest belief that he could pay his fare in a particular form, and the amount demanded is tendered while he is being ejected. *Louisville, etc., R'y Co., v. Harris*, 9 Lea, 180 ; s. c., 42 Am. Rep. 668.

The same rule applies when the passenger is under an honest but mistaken belief that he could obtain passage for a certain sum, and a greater rate is required of him.

It does not matter that the law allows a greater charge ; it is enough that the passenger has been accustomed to travel for the amount he offers, or does not willfully persist in paying less than the company rate when he is informed that he will be required to do so. Passengers are entitled to a reasonable time within which to comply with the conductor's demands, and he has no right to conclude that any apparent unwillingness so to do is an absolute and willful refusal to accede to them. See *L. N. & Gt. S. R. Co. v. Guinan*, 11 Lea, 98 ; s. c., 47 Am. Rep. 279.

The necessities and conveniences of railway travel neither require nor justify such haste as was used by the conductor in the present case, and as he allowed no sufficient time for making the tender after attempting to convince Bond that the additional ten cents should be paid, he should have accepted it after taking steps toward stopping the train for the purpose of expelling the appellee.

To hold differently would be to put the travelling public at the mercy of railroad employees, and subject passengers to inconvenience

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and damage, unless they yield implicitly to any demand however unreasonable it might at first appear, provided it should in fact be lawful and proper.

We think that under the facts of the case applicable to the charge it was correctly refused.

[Other matter omitted.]

Affirmed.

CLARK V. HANEY.

(88 Tex. 511.)

Trust — absolute deed — promise to re-convey.

A deed of mortgaged lands was executed by the mortgagors, husband and wife, to the mortgagee, upon the mortgagee's oral promise to the wife to sell the land, discharge the debt, and pay back the surplus or re-convey any portion unsold. *Held*, a valid and enforceable trust in equity.

ACTION to establish a trust in land. The opinion states the case. The action was dismissed below.

Matthews & Neyland and *T. D. Montross*, for appellant.

Perkins, Gilbert & Perkins, for appellee.

WILLIE, C. J. [Omitting minor points.] The facts upon which it is sought to establish, in the lands conveyed to defendant, a trust for the benefit of the plaintiff as alleged in the petition, are about these: Plaintiff and her husband were indebted to Haney in the sum of \$1,350, evidenced by their joint notes, which were secured by a mortgage upon the lands conveyed. These lands were the separate property of Mrs. V. I. Clark, and were worth \$10,000. Haney threatened to foreclose his mortgage if the notes were not paid. Mrs. Clark being unable to pay the notes, Haney demanded that a deed for the land be made to him for the amount of the indebtedness, which she refused to do, as the land was worth so much more than the debt. Failing in this, Haney then pretended to be dissatisfied with the mortgage security, and proposed that if Mrs. Clark and her husband would make him a deed for the land absolute on its face, he would give up the notes and would endeavor

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to sell the land, or a part of it, at private sale at its highest market value, and after satisfying his claim against plaintiff and her husband would pay over to her the remainder of the money arising from said sales, or convey to her the remainder of the land unsold after satisfaction of the debt. As an inducement to do this, he stated that he was a shrewd business man, and a man of means, and could get a better price for the land than she or her husband. Purchasers would expect to give him the full value, whilst they would expect to buy from plaintiff and her husband at a reduced rate, as they would probably be selling at a sacrifice to raise money, as they were known to be greatly in want of it. That her husband was a dissipated, improvident man, incapable of protecting her interests, and that the arrangement would be greatly to her benefit. As the defendant's undertaking was to be by parol, Mrs. Clark feared it would not be binding upon him, and for this reason objected to it and declined to sign the deed. Haney then prevailed upon her to go with him to a lawyer's office, who, upon hearing of the proposed arrangement, pronounced it as binding as if reduced to writing and signed by the defendant.

Thereupon the plaintiff, trusting in the representations and promises of defendant, and the advice of his attorney, joined her husband in executing the deed, and delivered possession of the premises to the defendant. She also alleges, that upon the delivery of the deed, Haney delivered up the notes of herself and husband, but the deed was not intended to cancel the indebtedness, and was not a conveyance in payment of the note, but though absolute on its face, was given in lieu of the mortgage, and for the more satisfactory security of the indebtedness to the defendant, and to enable him the more speedily to obtain payment by sale of the lands as provided in the parol agreement. She alleges that she was induced into the arrangement by the defendant, with the purpose of defrauding her out of the land for an inadequate price, and that he surrendered the notes with the intent to destroy the apparent relation of debtor and creditor between the parties, and to give a surer effect to the face appearance of the deed, and that she received them under the belief that the debt still existed, and that provision having been made for its speedy payment at the option of defendant, the notes were an unnecessary evidence of the debt. She alleged a repudiation of the trust by Haney, and that he claimed to hold the land as his own, free of the trust. She prayed for a

recovery of such lands as had not been sold by Haney, and tendered and paid into court the balance due on the indebtedness after deducting the amount realized from sales made under the trust. It is objected that these allegations show the execution of an incumbrance upon property by a married woman in a manner different from that pointed out by statute. The deed itself was properly executed. The promise of defendant was to a married woman, and had it been in writing, need not have been signed by any one but himself, and hence the law regulating conveyances by married women had nothing to do with the matter. It is said also that the facts show a conditional sale to Haney. If so, the plaintiff was entitled to a reconveyance of the property upon tender of the amount due to Haney, and this tender she made, and brought the money into court. There was no agreement as to the time in which the money should be paid, and hence one important element of a conditional sale was wanting; as at any event there was no time at which the defendant could claim that the payment was too late for a reconveyance.

But it is urged that the understanding between the plaintiff and defendant amounted merely to a promise on the part of the latter, and the breach of it was not a fraud of which a court of equity will take notice. It is laid down as a general rule by Browne in his work on the Statute of Frauds, section 95, which is fully supported by authority, that when a grant is made on the faith of a promise, and induced thereby, the breach of the promise is a fraud, and as such is ground for equitable relief. And to the same effect he lays down another general rule, which is precisely applicable to the case in hand, viz.: That where a verbal promise of the defendant to make a certain disposition of lands is the means of obtaining to himself the legal title, so that in fact he practices a deception upon his grantor by so obtaining the lands, and then holding and dealing with them as his own, a court of equity will compel him to perform his verbal agreement. All that is necessary is that the grantor has been duped by such promises into assigning his right to property, and that the trust has been afterward repudiated. Even in those States where the seventh section of the Statute of Frauds, 29 Car. 2, chap. 3, forbidding express verbal trusts, is in force, promises of this nature have been enforced; deeds apparently absolute have had parol trusts engrafted upon them to prevent fraud, although the trust was express, and as such forbidden by the

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statute (*Jones v. McDougal*, 32 Miss. 179 ; *Arnold v. Cord*, 16 Ind. 177 ; *Nelson v. Worrall*, 20 Iowa, 469 ; and see *Babcock v. Wyman*, 19 How. 289, and cases cited), and parol express trusts are not forbidden.

This section is not in force in our State, and it is the current of decision here that parol evidence is admissible to prove that a deed absolute on its face was executed and delivered upon certain trusts not reduced to writing, and which the grantor promised to perform. *Mead v. Randolph*, 8 Tex. 191 ; *McCleunny v. Floyd*, 10 Tex. 159 ; *Gibbs v. Penny*, 43 Tex. 560. Indeed every express trust may be considered as involving in some measure a promise on the part of the trustee to do some act for the grantor or some person named by him. If this promise can be repudiated at the will of the trustee and the grantor be left to his action for breach of contract, the subject of express trusts may as well be removed from equity jurisdiction.

The present case is that of agreement by the grantor, made before conveyance and as an inducement to it, to hold the lands deeded in trust for certain purposes, and to reconvey when the trust was fully executed. Relying upon his faithful performance of the trust, and to enable him to do so. the deed of conveyance was made, with the distinct understanding that it was not to be absolute, but in trust for the purposes agreed on between the parties. To allow the grantee to repudiate the trust after he had obtained the apparent title and gone into possession, and to appropriate to himself the whole benefit of the property, would be to sanction a fraud and a wrong which it is the duty of a court of equity to prevent or to remedy. There was error in sustaining the demurrer to the petition, for which the judgment is reversed and the cause remanded.

Reversed and remanded.

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(62 Tex. 518.)

Marriage—divorce—single act of cruelty—charge of unchastity.

Where a husband falsely accuses his wife of unchastity she may have an absolute divorce as for cruel treatment. (See note, p. 542.)

ACTION of divorce. The head-note states the point. The divorce was granted below.

Hancock & Shelley and *Walton & Hill*, for appellant.

Shocks & Sneed, for appellee.

WATTS, J. COM. APP. Our statute makes excesses, cruel treatment or outrages by the husband toward the wife or the wife toward the husband good ground for divorce, provided these are of such nature as to render longer living together in the marital relation insupportable.

In *Jones v. Jones*, 60 Tex. 460, Chief Justice WILLIE correctly remarked that "In some of the States it is not ordinarily deemed sufficient cause for divorce that the husband should have accused his wife of unchastity, but as an act of gross cruelty almost enough of itself for that purpose. Our courts, under the peculiar wording of our statute, hold it not almost but altogether a sufficient act of cruelty to justify dissolving the bonds of matrimony."

Here the court found that appellant did, in conversation with his daughter, call the appellee a prostitute. The same witness by whom that fact was established also testified, that a few days previous to that conversation, she heard appellant, in a conversation with appellee, call her "bad names."

It is claimed in the first place that the finding is not sustained by the evidence; that objection however is without any foundation. The witnesses were before the court and testified in person, and the court, acting in the capacity of a jury, passed upon the credibility of the witnesses, and determined the weight to be assigned to their statements. As these findings are presented by the record, they will be considered as conclusive.

However it is claimed, in the second place, that if it should be conceded that the finding is sustained by the evidence, then as explained and qualified by the circumstances developed in the case, it would not furnish a sufficient legal basis for a decree dissolving the bonds of matrimony.

Obviously the validity of the marriage relation is the substructure upon which the peace, happiness and perpetuity of society depends; therefore for this condition or state to be lightly considered, or the bonds of matrimony to be dissolved for slight cause, the effects of which are ephemeral, would be pernicious to society at

large. But when the law-making power has determined the policy with respect to, and has specified the grounds upon which divorces are authorized, it but remains for the judiciary to enforce the legislative will.

In regard to these statutory causes for divorce, in determining whether or not they are sufficient in the particular case, the social condition of the parties, their mode of life, and all the attending circumstances, should enter into the consideration of the question. Under some conditions, certain acts or words might constitute such outrages as would be held sufficient to authorize and require the dissolution of the bonds of matrimony, while under other conditions the same things would be held insufficient. This arises from the fact that the law seeks to adjust itself to the varied conditions of human society, and render its operations practically just to all.

For illustration, if the parties have led a rough marital life, usually peevish and crusty with each other, and are in the habit of bandying harsh epithets, then words spoken or acts done by the one to the other might not be good cause for divorce; whereas if the husband and wife were truly refined people, living upon such terms of mutual respect, harmony and devotion as ought to characterize that relation, the same acts or words might amount to the most lasting insult and aggravated outrage.

Here the record is comparatively silent as to the former life of the parties; hence it will be assumed that it had been reasonably quiet, moderate and respectful to each other.

It is a duty devolved upon the husband to protect the reputation of the wife from the unjust imputations and aspersions of others, and by the common consent of mankind, the husband who fails to extend such protection is regarded as a poltroon, and deserving the contempt of all. But when he goes farther, and is himself so unfeeling and merciless as to become the defamer, and seeks to disgrace and degrade his wife by falsely charging her with being a prostitute, in the language of Chief Justice WILLIE, in *Jones v. Jones*, *supra*, "Cruelty on his part has reached its utmost limit. He not only destroys her peace of mind, but exposes her to the contempt of the world and the insults and assaults of the worst of mankind."

In our opinion the ground upon which the court granted the divorce was amply sustained by the evidence, and under the attending

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circumstances fully warranted the decree. We therefore report for an affirmance of the judgment.

Judgment affirmed.

WEST, A. J., not sitting.

NOTE BY THE REPORTER.—See *Carpenter v. Carpenter*, 80 Kans. 712; s. c., 46 Am. Rep. 108; *Palmer v. Palmer*, 45 Mich. 150; s. c., 40 Am. Rep. 461, and note, 468.

But an unfounded charge of adultery, unless made in bad faith, is not ground for a divorce. *DeMeli v. DeMeli*, 87 How. Pr. 20.

Where a husband falsely accuses his wife with familiarity with other men, and infidelity to her marital vows, and accuses her with having the venereal disease, which she had communicated to him, such accusations are a sufficient ground for divorce. *McMahan v. McMahan*, 9 Oreg. 525.

It is extreme cruelty warranting a divorce for a wife to causelessly humiliate and disgrace her husband and endanger his means of subsistence by habitually, persistently and publicly accusing him of infamous conduct in violation of his marriage obligations, and by applying vile and vulgar epithets to him and dogging him and setting others to spy out his movements, until by inordinate and indecent exhibitions of jealousy and the criminal indulgence of unworthy suspicions and ungoverned violence she has practically destroyed the decencies and purposes of the marriage relation. *Whitmore v. Whitmore*, 49 Mich. 417.

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(62 Tex. 642.)

Will — power — “sell, exchange and dispose.”

Authority in the executor of a will to manage and control the estate in his discretion, and “sell, exchange and dispose” of it, includes the power to mortgage (See note, p. 548.)

TRESPASS to try title. The opinion states the point.

Felix Robertson and Herring & Kelley, for appellants.

Clark & Dyer, for appellees.

WALKER, P. J., COM. APP. [Omitting minor considerations.] Many of the features of this will are identical with those contained

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in the will which was construed in the case of *Orr v. O'Brien*, 55 Tex. 155, which see. The will in that case constituted the executrix such without bond and independent of the Probate Court; it gave to her all of the testator's personal and real estate "for and during her natural life, to be applied as she may deem best to the maintenance of herself" and their children. It provided that in the event of her death "such of the property as may be left" should be divided equally among the children; and declared it to be the purpose of the testator to make his wife "the unrestrained controller" of his property. Under these powers, without specific designation of authority to sell, it was held in that case that an absolute conveyance of real estate by the executrix vested the title.

Powers equally explicit, comprehensive and altogether of an analogous character, on the subjects embraced in the other will, are contained in this, as will be readily noticed by a comparison of the two. It seems to have been the intention of Mrs. Dashiell to unfetter, as far as she might be able to do by the use of apt and comprehensive expressions of her wishes, the discretion of her husband in respect to the management, control and disposition of her property so as to subserve what he might regard as being the interest of their children. The will directs that he shall, for the object which seemed most to interest her — the future welfare of her children — "manage and control" her entire estate "as he may think best" for the children's interest. This desire is again expressed in another part of the will, directing that he shall take charge of said estate and manage and control it for the support, maintenance and liberal education of her said children, followed by directions for the disposition of the residue remaining in the hands of the executor after raising and educating the children.

The authority thus conferred by the will confides to the judgment of the executor the mode by which he shall give effect to the main purposes of the trust. The will contemplates the necessity of raising money wherewith to support, maintain and furnish a liberal education to the children, and it anticipates the possibility that in doing these things a portion and perhaps all the property may be consumed. The management and the control of the property to effect these objects is unrestricted and unlimited otherwise than as the executor "may think best." The exercise of such a discretion as this evidently includes the choice of selling, leasing or of mortgaging the property if necessary, in his opinion, to raise money for

the objects of the trust. See *Orr v. O'Brien*, *supra*; *Danish v. Disbrow*, 51 Tex. 235.

Where the power is general to perform and carry out a particular object, a resort to the ordinary and usual methods or means comes within the scope of the power. See *Layet v. Gano*, 17 Ohio, 473; 10 Ohio St. 396; and see 1 Wait Act. & Def. 221; *Bridenbaker v. Lowell*, 32 Barb. 9, 17; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46. And in respect to an assignment or conveyance in trust, which contemplates a necessity for the raising of money, as to pay debts or the like, it seems that in the absence of express directions given in such, if the whole scope of the deed show that the parties must have intended a sale, a sale will be properly made; for in expounding trusts, though created by deed, the intention of the parties is to be pursued as much as in wills. See *Hill Trustees*, star p. 342. The same principle is equally applicable it seems to raising money by mortgage. *Id.*

The general power which the will conferred, to manage and control the party as the executor might think best for the interest of the children, embraced, we think, the power to mortgage or to sell in order to carry out the purposes of the trust; and the only remaining question is whether the will contains any provisions in it which have the effect to qualify or limit this general authority.

It is urged by appellees' counsel that the general authority conferred was restricted by the terms used in the will which empowered the executor "to sell," exchange and dispose of" the estate as he may deem necessary for the interest of the children. We think that these words, instead of being used in a restrictive sense, were intended to render more clear and absolute the authority and power meant to be conferred in the preceding and subsequent parts of the will which gave the executor full control and management of the estate for the purposes named. The power "to sell, exchange and dispose of" is consistent with the existence of the general powers conferred, and if the character and scope of the latter are varied by the specific designations thus indicated, the effect is to enlarge and extend the executor's authority of disposition of the property, rather than to contract, limit or diminish it.

The sentence in the will which invests the executor with his powers, directs that he shall manage and control the estate as he may think best, and in terms not less general and comprehensive, and indicative of the testatrix's wish that her husband should be

wholly unrestricted as to the modes whereby he should act in carrying out the purposes of supporting, maintaining and liberally educating her children, proceeds to instance the most absolute power that could be held by him as to the property, viz.: by selling it if he saw proper. She next provides for exchanging it if he saw proper; and last, in order to embrace any other supposable method of using the property to the children's advantage, she employs the general expression that he may "dispose of the estate in such way as he, in his discretion, may judge to be necessary for the interest of said children," and adds that his discretion shall not be hampered by responsibility to any one by reason of his free exercise of it in respect to the powers given to him. Reading the sentence as an entirety, and not in isolated, detached parcels, it is obvious, we think, that it manifests as a whole a single intention to invest her husband with the most ample power to use, control and in any wise to dispose of the property, and that there is no portion of it which warrants the interpretation of an intention to restrict or limit the executor's authority. Language more expressive of her confidence in the ability of her husband to manage the estate, and of her desire to invest him with power to dispose of the property in any way whatever that he deemed best calculated to promote the interest of her children, independent of all direction or dictation of any tribunal, and of responsibility to any person whomsoever, could hardly be used.

We are of the opinion therefore that there was ample authority conferred by the will on the executor to mortgage the land; and under a power for purposes so general and undefined as to particulars, the mortgagee would not be bound to ascertain the necessity for the loan to the executor, nor to see to the application of the money. See *Hill Trust*. (2d Am. ed.) 480; *Danish v. Disbrow*, 51 Tex. 241; 1 *Wait Act. & Def.* 323, § 3, and authorities there cited; *Sanger Bros. v. Heirs of Moody*, 60 Tex. 96.

If however we are to regard the power conferred on the executor "to sell, exchange or dispose of as he may deem necessary for the interest of my children," as a limitation upon the authority otherwise given in the will, it seems that the result must still be the same. Under a power to sell lands for the payment of debts, a mortgage, it seems, may be given to raise money for that purpose, unless it be the clear intention of the testator, in directing the sale, that his real estate should be absolutely converted. And although

there may be no specific direction for the sale of the estate, but only a trust to raise or to pay debts; or a devise subject to or charged with debts; or the debts and legacies being first deducted — in all these cases the trustees may properly raise the required amount by sale or mortgage, without waiting for a decree. *Hill Trust*. (2d Am. ed.), 499, 500 (star p. 355). It is laid down in many cases that a power of sale implies a power to mortgage. See *Gorlon v. Preston*, 1 Watts, 385; *Lancaster v. Dolan*, 1 Rawle, 231; *Williams v. Woodard*, 2 Wend. 492; *Duval's Appeal*, 38 Penn. St. 118; *Steifel v. Clark*, 9 Baxt. (Tenn.) 470. See also 4 Kent Com. 148; 3 Rawle, 109; 2 Wright (Penn.) 118; *Zane v. Kennedy*, 73 Penn. St. 182. And see numerous other cases collected and synopsized in a note in *Ferry v. Laible*, 31 N. J. Eq. (4 Stew.) 567 *et seq.*

In some other cases this doctrine has been denied, and in its application subjected to considerable modification. See *Hill Trust*. (2d Am. ed.) note 1, p. 499; and see *Bloomer v. Waldron*, 3 Hill, 361; *Ferry v. Laible*, 31 N. J. Eq. (4 Stew.) 577, *Page v. Cooper*, 16 Beav. 396; *Wood v. Goodridge*, 6 Cush. 116; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Coutant v. Servoss*, 3 Barb. 128; *Tyson v. Latrobe*, 42 Md. 325; *Hubbard v. German Catholic Cong.*, 34 Iowa, 31. Without attempting to indicate which of these lines of decision should be accepted as furnishing the proper rule to follow, it is sufficient to say that under this state of the law upon the point, the testatrix might well have supposed that in conferring the power "to sell" the authority was conferred thereby to mortgage the property.

But she extends still further the specifications of authority given to her husband. If it was her intention to limit it to that of selling, and to exclude the power to mortgage or to incumber, it would have been but superfluous redundancy to have added the authority "to dispose of my estate as he may deem necessary for the interest of my said children." Effect should be given to every part of the instrument if it may be done consistently with the intention of the testatrix and with its other parts. In *Gordon v. Preston*, 1 Watts (Penn.), 386, on the question whether a certain incorporated company had under its charter power to mortgage, GIBSON, C. J., said: "By the second section of the act of incorporation the company was authorized to purchase in fee or for any less estate 'all such lands, tenements or hereditaments, and estate real and personal, as shall be necessary and convenient for them in the prosecution of their

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works; and the same to sell and dispose of at their pleasure' According to the principle of *Lancaster v. Dolan*, 1 Rawle, 131, a power to sell includes a power to mortgage, even under the statute of uses, though strictly construed; and *a fortiori* it ought under a statutory grant which is to be beneficially construed in furtherance of the object. But the superadded words 'dispose of,' which would otherwise be redundant, leave no doubt of the existence of an intent to give the corporation power to part with its real estate by any voluntary act, without regard to the mode of its operation; and as a power to incumber might be necessary to the prosecution of its works, it is not to be doubted that it was intended to be given."

Nor is there less doubt, for the same reasons, that Mrs. Dashiell intended to confer, by the use of the same term, the powers which were accorded by the opinion of Chief Justice GIBSON to the incorporated company. Whilst it may be true that those words might not in every supposable connection and relation, when employed in written instruments, import such extended authority, and might according to the subject-matter upon which they are to operate, and under all the circumstances existing for their interpretations, be limited to narrower bounds in their interpretation, yet in the connection and relation in which they are here presented—"in furtherance of the objects" for the accomplishment of which the testatrix, as manifested by the whole will, was endeavoring to provide—we think the use of those words places it beyond dispute that the executor was fully authorized to mortgage the land.

We must look to all parts of a will to ascertain the intention of the testator. *Vardeman v. Lawson*, 17 Tex. 18. Under this rule of construction discrepancies and seemingly contradictory or repugnant clauses of it will be reconciled, and thereby effect given to what were the true intention and wishes of the testator. See *Wells v. Slater*, 2 Tex. L. Rev. 121 (unreported case).

For the errors indicated, we conclude that the judgment ought to be reversed and rendered by the Supreme Court in favor of the defendants. The cause having been submitted to the court without a jury; the facts not being controverted which involve the merits of the suit, and presenting only a question of law as to the rights of the respective parties to the suit; and there being apparent no reason why the trial below should not finally determine this suit, we are of the opinion that the Supreme Court ought to render on this appeal such judgment as ought to have been rendered on the evi-

dence adduced at the trial, which as above indicated ought to be for the defendants.

Judgment reversed.

NOTE BY THE REPORTER.— See *Stokes v. Payne* (58 Miss. 614), 38 Am. Rep. 840; *Buller v. Huestis* (68 Ill. 594), 18 Am. Rep. 589; *Switzer v. Wilbers* (24 Kans. 384), 36 Am. Rep. 259.

In *Loebenthal v. Raleigh*, 36 N. J. Eq. 169, the will contained this clause: "If it should seem necessary at any time to dispose of a portion of my real estate for the payment of my debts, I hereby give my executors power to do so, either at public or private sale." The estate included a very large tract of land, which could only be sold to advantage as a whole, and whose value would be greatly depreciated by selling any part or parts of it, and by reason of its character and value a purchaser could only be obtained exceptionally and by effort. On an application by the executors (in which the beneficiaries under the will joined), *held*, that authority to mortgage it to raise sufficient money to pay the debts after applying the personal estate, should be given.

In *Strefel v. Clark*, 9 Baxt. 466, it was held that a deed to a husband in trust for his wife, providing that the wife should have power of disposing of said property by deed or will, as if she was a *feme sole*, carried with it the power to mortgage.

In *Wilson v. Maryland Life Ins. Co.*, 60 Md. 150, the will contained the following clause: "My said trustee shall have power to invest, and change the investment of said moiety, and for that purpose to sell, convey and dispose thereof, or any part thereof, as often as he may think proper." *Held*, that this power did not authorize the trustee to mortgage the property to secure the repayment of a loan. The court said: "The question is, whether the mortgage is valid, so far as it affects the rights and interests of the *cestuis que trust*? And this depends upon the construction of the power conferred on the trustee by the will. A power of sale, like all other powers, can be exercised only in the mode and upon the terms and conditions prescribed by the instrument creating it. Did the testatrix then, in authorizing the trustee to sell and dispose of the property devised to him in trust for the purpose of reinvestment, and for this purpose only, mean that he should mortgage it to secure the payment of borrowed money? or did she mean an out and out sale or conversion of the property, and a reinvestment of the proceeds arising from the sale, for the benefit of all parties interested under the will? Now it seems to us in the face of *Latrobe v. Tynon*, 42 Md. 323, the meaning of the words 'sell and dispose,' as used in this connection, is hardly an open question. In that case, as in this the trustee was authorized to 'sell and dispose of the property,' and in that case as in this the trustee mortgaged the property to secure the payment of borrowed money. After full argument and full consideration, for all of us felt the law pinched hardly in that case, we were obliged to hold both on principle and on authority, that the power meant an 'out and out sale,' or 'conversion' of the property; and that the trustee was not authorized to pledge it by way of mortgage. If such then be the meaning of the words 'sell and

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dispose,' as denoting the extent of the power to be exercised by a trustee, is there any thing on the face of this will to show that they were used by the testatrix in any other or wider sense? We think not. On the contrary, looking to the nature and objects of the trust, and the character of the property, it is plain she never meant to authorize the trustee to mortgage it for borrowed money. Already had she given him one-half of her entire property, and the other half too, she had devised in trust for him for life, with remainder to her children. The property was an outlying tract, near the city limits, yielding but a small yearly income, and it might be to the interest of all parties concerned, that it should be sold in whole or in part, and the proceeds of the sale reinvested. With that view, for the purpose of changing the investment, the testatrix authorizes the trustee to sell and dispose of the property; and to say the trustee may do something else, that he may borrow money and mortgage the property, would be giving to the language used in conferring the power, and declaring the purpose for which it was to be exercised, a meaning not warranted by any sound rule of construction."

Where a testator clothed his executor with discretionary power to sell such unproductive property as in his judgment would be to the interest of the estate, or convert the same into productive property by making improvements thereon, when in his judgment and discretion justified by the condition of the estate, and throughout the will his intention appeared to be that his executor should keep his estate intact so far as he was able, and generally to manage it in such way as to make it as productive as possible, it was *held*, that the executor had the power to borrow money to improve unproductive real estate, and to give a mortgage on the property to secure the loan. *Starr v. Moulton*, 97 Ill. 525.

Where an executor is empowered generally, by will, to improve unproductive real estate, and such power is practically without limit, being an authority to make improvements to any extent, which in his judgment and discretion the condition of the estate should warrant, it will be presumed the testator intended to give his executor such power over the estate as would enable him to raise whatever means would reasonably be required in making the contemplated improvements, and this includes the power to mortgage. *Id.*

Where a trustee has acted in good faith in a matter pertaining to the trust, and it is evident from the instrument creating the trust that it was intended to clothe him with large discretionary powers in the discharge of his duties, and it does not clearly appear that he has transcended them, courts of equity are not inclined to disturb and unsettle an important business transaction thus entered into by him, to the detriment of third parties who have acted in equally good faith. *Id.*

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

SMITH v. ST. PAUL CITY RAILWAY COMPANY.

(23 Minn. 1.)

Negligence — presumption of — carrier.

In case of a collision between cars of a street railway company a presumption of negligence arises. (*See note, p. 553.*)

ACTION for personal injury by negligence. The opinion states case. The plaintiff had judgment below.

H. J. Horn, for appellant.

C. K. Davis, for respondent.

VANDEBURGH, J. This action is brought to recover damages for personal injuries alleged to have been caused by a collision between two street cars of the defendant, on one of which plaintiff claims to have been a passenger, and insists that under the circumstances it is liable for the exercise of ordinary care only.

[Other points omitted.]

In support of the charge of negligence in the management of the rear car (No. 26), and the horses attached to it, plaintiff's evidence tended to prove that before he reached the forward car (No. 8), he saw car 26 approaching upon an up grade, about one-half block away, and moving at the usual rate of speed; that while he

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was in the act of entering the car which stood waiting for him. hearing a noise on the track behind him, he looked around and saw the horses of car No. 26 approaching rapidly, and immediately the collision occurred in which he was injured. The horses and car 26 were turned to the right and run off the track, and immediately stopped in the street along-side of car No. 8, which was also thrown off the track. Assuming the testimony of plaintiff and his witnesses to be true, it is evident that the forward car must have been struck either by the horses or some part of car No. 26, and that plaintiff was struck and injured thereby. We think it is also evident that the horses must have started into a gait much more rapid than usual in such service, or proper, considering the proximity of the forward car; but plaintiff's evidence however failed to explain this, and though it included the testimony of passengers in car No. 26 at the time, it did not appear as a part of plaintiff's case that the horses had in fact become unmanageable, or were actually "running away." The collision occurred in the evening, and during a storm, but the streets were sufficiently lighted, so that the plaintiff and car No. 8 were discernible by the driver of car No. 26. No adequate or satisfactory cause therefore for the happening of the accident and injury to plaintiff, consistent with due diligence on the part of the defendant, is disclosed by plaintiff's case.

The severe rule which enjoins upon the carrier such extraordinary care and diligence is intended, for reasons of public policy, to secure the safe carriage of passengers, in so far as human skill and foresight can effect such result. From the application of this strict rule to carriers it naturally follows that where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or any thing pertaining to the service which the carrier ought to control, a presumption of negligence arises. The general rule is thus stated in *Scott v. London Dock Co.*, 3 Hurl & C. 596. "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The rule is therefore frequently stated, in general terms, that negligence on the part of the carrier may be presumed from the mere

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happening of the accident. The reason of the rule seems to be that from the very nature of things the means of proving the specific facts are more in the power of the carrier. The latter owning the property and controlling the agencies, is presumed to have peculiarly within his own knowledge the cause of an accident, which he might be interested to withhold, and which the passenger could not know and might himself be unable to prove. *Thomp. Carr.* 211. The application of this rule is not limited to a breakage or defect in the vehicle in which the passenger is carried, but "extends to any other thing which the carrier can and ought to control, as a part of its duty to carry passengers safely." *Meier v. Pennsylvania R. Co.*, 64 Penn. St. 225; s. c., 3 Am. Rep. 581; *Feital v. Middlesex R. Co.*, 109 Mass. 398; s. c., 12 Am. Rep. 720. Hence the fact of a collision between cars belonging to the same company upon a railway track is considered *prima facie* evidence of negligence on the part of the company, and it is not necessary for the plaintiff to prove specifically in what it consisted. If it occurred without the fault of defendants, it is ordinarily for them to show it. *Skinner v. London etc., Ry. Co.*, 5 Exch. 787; *Railroad Co. v. Pollard*, 22 Wall. 341; *Ang. Car.* (5th ed.), § 780. Where however the plaintiff's own evidence shows the operation of causes beyond the control of the carrier, as the presence of *vis major* or the tortious act of a stranger, tending to produce the accident, the plaintiff in order to make out a *prima facie* case, will generally be obliged to go further and prove the actual concurrence of the negligence of the defendant as an operating and efficient cause, or that by the exercise of due diligence the accident might have been avoided. *Whart. Neg.*, § 661; *Thomp. Carr.* 213; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, *Gillespie v. St. Louis, etc., Ry. Co.*, 6 Mo. App. 554. The reason of the distinction is so plain that in practice it is not difficult to apply the correct rule.

In the case at bar, plaintiff's evidence did not tend to prove that the accident was attributable to extraordinary causes beyond defendant's control. The burden therefore devolved upon the defendant to exonerate itself from liability by showing that the collision was due to inevitable accident, or some cause for which it was not responsible. *Skinner v. London, etc., Ry. Co.*, *supra*. The motion to dismiss the action was properly denied, and the rule laid down by the court as to the burden of proof in such cases was correct.

Order affirmed.

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NOTE BY THE REPORTER.-- See *Scybolt v. N. Y., etc., R. Co.*, 95 N. Y. 562; s. c., 47 Am. Rep. 75; 29 Alb. L. J. 286; 10 Abb. N. C. 200, 205, note.

In an action for a personal injury caused by a car door falling upon plaintiff while he was standing on a street where a freight train of defendant containing the car was passing, where it does not appear how the door happened to fall except that the fastenings had become insufficient, probably by wear or breakage, mere proof of the accident and its attending circumstances does not raise a presumption of negligence on the part of the defendant, and cast the burden of rebutting such presumption upon it, but plaintiff must prove that the defect causing the accident came to the knowledge of defendant, or existed for such a length of time that knowledge should be presumed. *Gandy v. C. & N. W. R. Co.*, 30 Iowa, 420; s. c., 6 Am. Rep. 682; *McCummons v. C. & N. W. R. Co.*, 33 Iowa, 187; *Aylesworth v. C., R. I. & P. R. Co.*, 30 Iowa, 459; *Perry v. Railroad Co.*, 36 Iowa, 102; *Davis v. C., R. I. & P. R. Co.*, 40 Iowa, 292; *McCormick v. C., R. I. & P. R. Co.*, 41 Iowa, 198; *Loose v. Buchanan*, 51 N. Y. 476; s. c., 10 Am. Rep. 623; *Garrison v. New York*, 5 Bosw. 497; *Hall v. Manchester*, 40 N. H. 410; *Hart v. Brooklyn*, 36 Barb. 226; *Thomp. Neg.* 1227. *Case v. Chicago, etc., R. Co.*, Iowa Supreme Court, Oct. 22, 1884.

Where a stevedore, engaged in his usual occupation, falls through an ordinary coal-bunker hatch that is used for stowing cargo, the presumption is of his negligence rather than that of the officers of the vessel. The leaving open a common between-deck hatchway while the vessel is lying in port, under ordinary circumstances is not presumptive evidence of negligence on the part of the ship. This is not only shown to be the custom by the testimony in this case, but it has been so frequently commented upon in decisions, as to be too well settled to be questioned. *Victoria*, 13 Fed. Rep. 43; *Dwyer v. Nat. Steamship Co.*, 4 Fed. Rep. 493; *The Carl*, 18 Fed. Rep. 655; *The Germania*, 9 Ben. 356; *The Helios*, 12 Fed. Rep. 732. While the falling through an open hatchway, by a stranger, a landsman, visitor, or passenger on board a vessel might not be presumptive of negligence on his part, where such accident occurs to a seaman or stevedore, who is accustomed to hatches, their presence, necessity, uses, character, and location, the case is different, and unless the circumstances of the particular case are such as to rebut it the first presumption is of his negligence. District Court., S. D. Ga., June 9, 1884. *The Gladisohus*. Opinion by JOCKE, J.

See *Phil. & Reading R. Co. v. Anderson*, 94 Penn. St. 351; s. c., 39 Am. Rep. 787; *Iron Ry. Co. v. Mowery*, 36 Ohio St. 418; s. c., 38 Am. Rep. 597.

In *Delaware, etc., R. Co. v. Napheys*, 90 Penn. St. 135, it was held that where a train has come to a stop and a passenger, on stepping from the lowest step of the platform of the cars to the ground, fractures her knee-cap, without any apparent external cause, no presumption of negligence is raised. The court said:

"The general rule is that a party who alleges negligence as the basis of a claim for damages is bound to prove the fact alleged, and the extent of the injury, if more than nominal damages are claimed; but in some cases slight proof only is required to justify a presumption of negligence. The mere circumstances attending the injury when put in proof may be enough to cast the burthen of exculpation on the defendant. If a passenger seated in a rail-

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road car is injured in a collision, or by the overthrow of the car, the breaking of a wheel, axle, or other part of the machinery, he is not required to do more in the first instance than to prove the fact and show the nature and extent of his injury. A *prima facie* case of negligence is thus made out, and the onus is cast upon the carrier to disprove negligence. It was accordingly said in *Sullivan v. Philadelphia & Reading R. Co.*, 29 Penn. St. 234, when a railroad company undertakes the transportation of a passenger for an agreed price, 'the contract implies that they are provided with a safe and sufficient railroad to the point indicated; that their cars are staunch and roadworthy; that means have been taken beforehand to guard against every apparent danger that may beset the passenger, and that the servants in charge are tried, sober and competent men. When in the performance of this contract a passenger is injured, without fault on his part, the law raises *prima facie* a presumption of negligence, and throws on the company the onus of showing that it did not exist.' It is reasonable that it should be so, because the company has in its possession and under its control, almost exclusively, the means of knowing what occasioned the injury and of explaining how it occurred, while as a general rule, the passenger is destitute of all knowledge that would enable him to present the facts, and fasten negligence on the company, in case it really existed. The facts of the present case are very different. The cars were at rest on the track; there was no jar or breaking of machinery, Mrs. Napheys, with the assistance of her husband, was descending the steps from the platform of the car. They had every opportunity of seeing and knowing where she was going, and controlling her movements. If the lower step was inconveniently or dangerously high for her in the condition she was, she and her husband had as good an opportunity as any one else of knowing the fact. If they had even a suspicion that it was in the least degree unsafe for her to take the last step, there was no urgent necessity for her to do so. The train had reached its destination and there was no occasion for haste in leaving the car. If they had any apprehension of danger, or even inconvenience in descending from the lower step, there was nothing to prompt them to incur the risk. They might have called on those in charge of the train to provide a better and more convenient means of egress, if they deemed it necessary. Taking the uncontradicted facts of the case, as they were presented, there existed no reason for relaxing the general rule that he who alleges negligence as the basis of a claim for damages, is bound to prove it affirmatively."

In *Baltimore, etc., R. Co. v. State*, 63 Md. 135, the deceased had purchased her ticket, and was waiting outside of the ticket office for the train which she purposed to take. The platform at which the train was to stop was on the opposite side of the track. There was evidence to show that the agent at the station, notified the deceased of the approach of the train, and directed her to cross over to the platform in ample time for her to do so in safety, but that after getting almost across, she turned and went back to the ticket office to look after a bundle, and did so against the agent's directions, and then against the warning of a bystander, attempted to cross the track, in consequence of which she was killed. *Held*, not to raise the presumption of negligence on the part of the defendant. The court said:

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"These cases proceed on the ground, that the carrier is bound to exercise the greatest care and diligence, in every thing that concerns the safety of passengers; and if one is injured by the breaking down or upsetting of the vehicle used in the transportation, or by the colliding of one train with another, or by the train running off the track, from some defect in the road-bed, in these and in other like cases, the evidentiary facts in themselves create a presumption of negligence on the part of the carrier. Under such circumstances, the carrier must show that the accident happened in spite of the exercise by him and his servants of the greatest degree of care and diligence, practicable under the circumstances. In other words, although the burden of proof is on the plaintiff to show that the injury was occasioned by the negligence of the defendant, yet he discharges this burden and makes out a *prima facie* case by showing that the accident happened through the failure of some of the means used by the carrier in making the transit."

In *Murphy v. Coney Island, etc., R. Co.*, 86 Hun. 199, an action for injuries sustained while travelling on one of the defendant's horse cars, the plaintiff testified that just before she had reached the depot, at which she was to leave the train, the car gave a jolt, and then a second jolt; she heard a grinding noise under the wheels, and the car seemed to be lifted off the track; that she was lifted off her seat, thrown forward between the seats and injured. *Held*, to justify the inference of negligence. The court said: "It is an undoubted rule, and one governing all causes of actions for damages negligently inflicted, that the plaintiff must prove that the injury was caused by the negligence of the defendant. The rule has not been varied, but there has been difference of opinion in judges as to its application in certain cases. There was a tendency in the case of common carriers of passengers to hold that the fact of the injury while being carried raised a presumption of negligence which the carrier was bound to explain. There was also a tendency in some of the early cases to hold that the plaintiff must prove some particular thing which caused the injury, and that the defendant was liable for its condition. This was found to be a hard rule upon passengers who were ignorant of the cause of the injury, but yet had been injured under circumstances which called for no inquiry, and when explanation was due as to the reason of the accident, from whatever cause. The rule is settled by the Court of Appeals that it is not necessary to prove the direct cause of the injury; that while the plaintiff had the burden of proof, an inference of want of care may be made out by the injury and the circumstance attending it, and then the burden of explanation is cast upon the company or carrier of passengers. *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 286. The happening of an accident, which in the usual and ordinary course of things would not happen with proper care, casts the burden on the defendant of explaining the accident so as to relieve itself from liability. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 632. Under these cases the plaintiff was entitled to go to the jury."

In *Wall v. Lévacy*, 6 Colo. 465, it was held that negligence is to be presumed from the overturning of a stage-coach. The court said: "We concede the law to be, that in order to entitle a passenger to recover against a carrier for injuries received on the journey, he must prove that he received the injur-

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ies while a passenger upon the coach or road of the carrier, and that the same were occasioned by the negligence of the carrier. A *prima facie* case however is made out by proof that the relation of carrier and passenger existed between the parties; that an accident occurred resulting in injury to the passenger, and that it was occasioned by the failure of some portion of the machinery, appliances or means provided for the transportation of the passenger. This proof being made, a presumption of negligence on the part of the carrier arises, and the plaintiff is not bound to go further and show the particular defect or cause of the accident, until the presumption is rebutted. It devolves upon the carrier then to rebut this presumption by evidence that he exercised the greatest degree of diligence practicable under the circumstances.

"The reason of the rule, as applied to this class of cases, appears to be founded in the nature of the carrier's undertaking, and the relations subsisting between him and those whom he undertakes to carry.

"He assumes the responsibility of providing suitable and sufficient means for transportation, and he has the exclusive management of the same during the journey. As a general rule, when an injury occurs, he has the superior, if not the exclusive means of knowledge within his control as to what caused the accident. In view of his undertaking, and of these relations, the law binds him to make use of all the ordinary precautions for the safety of the passengers on the road, and to do all that human care, vigilance and foresight reasonably can, under the circumstances, in view of the character and means of conveyance adopted, to prevent accidents which may result injuriously to his passengers. Story Bailm., §§ 590-598; *Tuller v. Talbot*, 28 Ill. 357.

"When therefore an injury happens to a passenger from an accident to the vehicle or other means of transportation employed, until explained it is presumable that it happened for want of due care on the part of the carrier. If however in proving the injury, facts and circumstances are developed which tend to exonerate the carrier, or to charge the plaintiff with having contributed to the injury received, no such presumption arises.

"One of the earliest leading cases on this point is that of *Christie v. Griggs*, 2 Camp. 79. In that case the plaintiff proved that he was a pilot by occupation, that he was traveling to London by stage, when the axle tree broke, precipitating him to the ground, and severely injuring him, by reason of which he was confined to his bed for several weeks. At this point the plaintiff rested, when it was insisted by opposing counsel that he must go further, and show either that the driver was unskilful or that the coach was insufficient. But Sir JAMES MANSFIELD, C. J., held that the plaintiff had made out a *prima facie* case by proving his going upon the coach, the accident, and the damage he had suffered. It was then for the defendant to show the sufficiency of the coach and the skilfulness of the driver. The plaintiff, being a sailor, would not know whether the coach was well built or not, or whether the driver drove skilfully. It was further held that when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied, he having always the means to rebut this presumption if it be unfounded.

"This case, with others announcing a similar doctrine, is cited approvingly

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by the Supreme Court of the United States in the case of *Stokes v. Saltonstall*, 13 Pet. 181.

"That was an action to recover damages for an injury sustained by the wife of the defendant in error, by reason of the upsetting of a stage-coach in which she was a passenger. The declaration charged that the injury was caused by the negligence and want of skill of the driver, which allegations were put in issue by the plea of the defendant. The first instruction to the jury in the court below was: 'The defendant is not liable in the action, unless the jury find that the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care of the driver of the carriage in which he and his wife were passengers, and the facts that the carriage was upset, and the plaintiff's wife injured, are *prima facie* evidence that there was carelessness, or negligence, or want of skill on the part of the driver, and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.' The second instruction was: 'It being admitted that the carriage was upset, and the plaintiff's wife injured, it is incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged, and that he acted on this occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence or want of skill or prudence on his part, then the defendant is liable in this action.' The Supreme Court held that these instructions laid down the law correctly, and that construing the two instructions together, it was only necessary for the defendant, in order to meet the plaintiff's *prima facie* case, to prove that the coachman was a person of competent skill in his business, that the coach was properly made, the horses steady, etc.

"Another leading case upon the point under consideration is *Curtis v. Rochester & Syracuse Railroad Co.*, 18 N. Y. 534. This was an action for damages received by a passenger on defendants' railroad, alleged to have been caused by the negligence of defendants' servants. The train containing the plaintiff ran off the track at a switch, whereby the plaintiff was seriously injured. An instruction had been given to the jury on the trial 'that the fact of this accident occurring was of itself presumptive evidence of negligence on the part of the defendants.' The doctrine of this case is, that whenever it appears that the accident occurred through some defect in the vehicle, or other apparatus belonging to the defendant, and used in connection with his business, a strong presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arises, but when nothing is known in regard to the cause of the accident, and it may as well have been caused by the act of a stranger, for which the carrier is not responsible, as by his employees, for whose acts he is responsible, no such presumption arises. In respect to the instruction given, the court called attention to the fact that it did not announce a general proposition of law, but was limited to the case on trial; and in the judgment of the court, enough of the circumstances of the case were proved to warrant the presumption of negligence against the railroad company, which it must rebut in order to discharge it from liability.

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"The following cases are to the same effect : *Railroad Company v. Pollard*, 22 Wall. 841 ; *Roberts v. Johnson*, 58 N. Y. 618 ; *Meier v. Penn. R. Co.*, 64 Penn. St. 225 ; *Toledo, Wabash & Western R'y Co v. Beggs*, 85 Ill. 80 ; s. c., 27 Am. Rep. 618 ; *Sawyer v. H. & St. Jo. R. Co.*, 87 Mo. 240 ; *Fairchild v. Cal. Stage Co.*, 18 Cal. 599. See also *Angell Carr.*, § 569 ; *Thomp. Carr. of Pass.*, 210, 214 ; *Shear. & Redf. Neg.*, § 280."

This presumption of negligence arises from the contractual relation of the carrier to the public, and does not arise in cases of mere negligence aside from such relation.

"No one," says Mr. Justice FIELD, "is responsible for injuries resulting from inevitable accident whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or omission, has violated some duty incumbent upon him which has caused the injury complained of. The cases between passengers and carriers stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which the carrier must overcome. His contract is shown, *prima facie* at least, to have been violated by the injury. Outside of those cases in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not, the plaintiff must prove it. * * * The rule deducible from the cases is, that the measure of care against accident which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own." *Nitro-Glycerine case*, 15 Wall. 524 "It is believed," says Mr. Thompson, "that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to the plaintiff, without more, will amount to evidence of negligence on the part of the defendant." 2 *Thomp. Neg.* 1227. So in *Young v. Bransford* it was held that the explosion of a steam boiler used for running a saw-mill does not raise the presumption of negligence. The court said :

"The leading case upon the liability for an injury occasioned by the explosion of a stationary steam boiler is *Spencer v. Campbell*, 9 Watts & Serg. 32. The action was for the value of a horse which had been driven to the defendant's steam grist-mill to get some grist, and was killed by the explosion of the boiler. The opinion of the court proceeded upon the ground that to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill and diligence. In *Loose v. Buchanan*, 51 N. Y. 476 ; s. c., 10 Am. Rep. 623, the action was for damages done to the buildings of the plaintiff by the projection on to his premises by explosion of the defendant's boiler, or rather of the boiler of a corporation for making paper, of which the defendants were trustees, stockholders and agents. The decision was that where a person places a steam boiler on his premises for the purpose of carrying on a lawful business, and operates the same with care and skill, so that it is not a nuisance, he is not liable, in the absence of proof of fault or negligence on his part, for damages to his neighbor occasioned by the explosion of the boiler. The

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authorities bearing upon the general question of liability in such cases, and the principles of law underlying them, were ably reviewed and considered. The same conclusion was reached by the Supreme Court of New Jersey in *Marshall v. Wellwood*, 88 N. J. L. 839; s. c., 20 Am. Rep. 394, a similar case. In both of these cases however, the main question was whether the defendant was liable for the immediate consequences of the bursting of the steam boiler irrespective of any question as to negligence or want of skill on his part. And although they hold that there must be evidence of negligence to sustain a recovery, they do not determine the mode of proving negligence, or what shall be *prima facie* evidence of it: *Mullen v. St. John*, 57 N. Y. 567; s. c., 15 Am. Rep. 580. In *Rose v. Transportation Co.*, 11 Fed. Rep. 438, which was an action in the Circuit Court of the United States by a passenger on a steamboat for injuries caused by an explosion of the boiler, WALLACE, D. J., instructed the jury 'That from the mere fact of an explosion it is competent for you to infer as a proposition of fact that there was some negligence in the management of the boiler, or some defect in its condition, for otherwise a casualty would not have occurred.' In *Foy v. Davidson*, 13 Minn. 523, which was an action by a passenger on one steamboat for injury caused by the explosion of the boiler of another steamboat, the learned judge who delivers the opinion, by way of *obiter*, says: 'But irrespective of the act of Congress, and speaking for myself alone, I am inclined to the opinion, that under the undisputed facts of this case, the explosion is *prima facie* evidence of negligence.'

"It is obvious from this review of the authorities that the question of the effect of the mere proof of the killing of the plaintiff's husband by the explosion of the defendant's boiler is one of grave doubt, and great importance. 'Steam,' it has been well said, 'has come into such general use as a motive power, not only in the operations of commerce and manufactures, but even in those of agriculture, that a rule of law making those who employ it insurers of the safety of others against damages arising from its use would not only be contrary to the analogies of the law, but would impose serious restraints upon the most necessary and beneficial industries. Both the proprietor of machinery impelled by steam, and the engineer in charge of such machinery, have the strongest motives for watching over its safety. The property of the one and the life of the other depend upon constant vigilance in this regard. These motives will, ordinarily, secure that degree of skill and attention which the safety of the public demands, without the aid of a rule making the proprietor liable, in any event, for damages from an explosion.' 1 Thomp. Neg. 112. If, in the language of the trial judge in the case before us, 'when the killing is proved to have been done by the explosion of the defendants' boiler, the burden is thrown upon them to show that they were guilty of no negligence, and that the accident was unavoidable,' the owners of the boiler would be virtually held as insurers of the safety of others against damages arising from its use. At the same time, the fact there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge WALLACE as above, 'that from the mere fact of an explosion it is competent

for the jury to infer as a proposition of fact that there was some negligence in the management of the boiler, or some defect in its condition.' It ought not to have the weight of a conclusive presumption, either of law or fact, so as to compel the defendants, in order to avoid liability, to prove affirmatively 'that they were guilty of no negligence, and that the accident was unavoidable.' For the defendants might in some instances, as where the engineer and other employees were killed, be unable to make any positive proof. At most the question of negligence should be left to the jury to determine upon the evidence actually introduced. *Sommers v. Railroad Company*, 7 Lea, 204, 205."

In *Lyons v. Rosenthal*, 11 Hun, 46, the court held that the falling of a box which was being hoisted, afforded *prima facie* evidence of carelessness.

In *Smith v. British Packet Co.*, 46 Supr. Ct. 86, affirmed in 86 N. Y. 406, it was held that the bare fact that plaintiff was injured by the falling of berths on defendant's vessel was *prima facie* evidence of want of ordinary care. The court say: "The use of ordinary skill and of materials of ordinary strength would enable the builders of the structure that was meant to uphold the berths, to make it secure against the strains and shocks of a sea of not extraordinary violence. These means of this security being at the command of the owners of the steamship, the law presumes that there was negligence when the berths fell." To same effect, *Railroad Co. v. Walrath*, 38 Ohio St. 462.

The plaintiff in *Gerlach v. Edelmeyer*, 47 Supr. Ct. 292, was injured by the fall of an elevator under defendant's control. The jury were instructed that they might find negligence from the simple fact that the accident occurred under such circumstances. On appeal this instruction was held to be correct, the court disposing of the question in these words: "The learned judge charged that *prima facie* the accident happened through Dittner's negligence, and that the burden of proof was on the defendants to show that Dittner was not negligent. This I think is a correct statement of the law in this case. The elevator was under the management of defendant's servants, and in the ordinary course of events the accident would not have happened if their servant had been careful. The happening of the accident therefore affords evidence in the absence of explanation, that the accident happened from want of care."

BROWN V. JORDHAL.

(32 Minn. 126.)

Negotiable instrument — sealed note.

An instrument in the form of a negotiable note, but with the word "[sealed]" (the statutory substitute for a common-law seal), following the maker's signature, is sealed and not negotiable, although it further purports to be "negotiable" and payable at a specified place.

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ACTION on a written instrument. The opinion and head-note show the facts. The defendant had judgment below.

D. R. P. Hibbs and John Whytock, for appellant.

Lovely & Morgan, for respondent.

GILFILLAN, C. J. The defendant executed an instrument in the form of a negotiable promissory note, except that after and opposite the signature were brackets, and between them the word "seal," thus, "[seal.]" The question in the case is, is this a negotiable promissory note, so as to be entitled to the peculiar privileges and immunities accorded to commercial paper? The rule that an instrument under seal, though otherwise in the form of a promissory note, is not (certainly when executed by a natural person, however it may be when executed by a corporation) a negotiable note, entitled to such privileges and immunities, is universally recognized, and is not disputed in this State. But the appellant contends that merely placing upon an instrument a scroll or device, such as the statute allows as substitute for a common-law seal, without any recognition of it as a seal in the body of the instrument, does not make it a sealed instrument. Undoubtedly where there is a scroll or device upon an instrument, there must be something upon the instrument to show that the scroll or device was intended for and used as a seal. The scroll or device does not necessarily, as does a common-law seal, establish its own character. Such words in the *testimonium* clause as "witness my hand and seal," or "sealed with my seal," would establish that the scroll or device was used as a seal. No such reference in the body of the instrument was necessary in the case of a common-law seal. *Goddard's case*, 2 Coke, 5a; 7 Bac. Abr. (Bouvier's ed.) 244. Nor is there any reason to require it in the case of the statutory substitute, if the instrument anywhere shows clearly that the device was used as and intended for a seal. It would be difficult to conceive how the party could express that the device was intended for a seal more clearly than by the word "seal," placed within and made a part of it. This was an instrument under seal.

Order affirmed.

DICKINSON, J., took no part.

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NEWELL v. RANDALL.

(28 Minn. 171.)

Fraud — representation of solvency — concealment.

A person desiring credit being asked "how he stood," correctly stated his means, but was silent as to the fact that he owed two thirds as much as his capital. *Held*, fraudulent.

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

Woolley, Biddle & Reed, for appellant.

Lane & Dodge, for respondent.

MITCHELL, J. Action of replevin, plaintiff alleging himself to be the owner and entitled to the possession of the personal property in controversy. Defendant, by his answer, denies plaintiff's ownership and right of possession, and alleges that it was the property of one Bauman, and justifies his taking, as sheriff, by virtue of certain writs of attachment against the property of Bauman. In reply plaintiff alleges that he sold the property to Bauman on credit, induced so to do by false and fraudulent representations of Bauman as to his financial condition, which rendered the sale voidable and gave him the right to rescind and reclaim the property. On the trial it was undisputed or sufficiently proved that this property was sold by plaintiff to Bauman on credit. It also appeared that about the first of August, 1881, Bauman, who was in trade at Ortonville, applied to plaintiff's travelling agent, De Laittre, to purchase goods on credit; that De Laittre told him that "it would be necessary to know how he stood;" that Bauman said in response to this that "he had \$3,000 in his business, consisting of merchandise and book accounts, and that he had \$300 in cash." On this De Laittre took his order and submitted it, together with his statement, to plaintiff, who, on the strength of it, shipped him the goods.

On the trial no evidence was offered to show that Bauman did not in fact have merchandise and book accounts to the amount of \$3,000 and \$300 in cash. But it was proved that at the time he made the statement he was indebted in his business to the amount of \$2,100 — a fact which he failed and omitted to state. It also appears that early

in November following Bauman was largely indebted on various other overdue debts, on which suits were brought against him and his property attached; but as it does not affirmatively appear when these debts were contracted, they cannot here be considered.

It is earnestly contended that this evidence is insufficient to establish plaintiff's allegation that Bauman obtained the goods by fraud; that he was not inquired of as to his debts; and that no duty was imposed on him to make a voluntary statement in regard to them. It is doubtless the general rule that a purchaser, when buying on credit, is not bound to disclose the facts of his financial condition. If he makes no actual misrepresentations, if he is not asked any questions and does not give any untrue, evasive or partial answers, his mere silence as to his general bad pecuniary condition, or his indebtedness, will not constitute a fraudulent concealment. 3 Pom. Eq. Jur., § 906; Bigelow Fraud, 36, 37. But this was not a case of mere passive non-disclosure. The object of De Laittre's inquiry clearly was to ascertain Bauman's financial condition and ability to pay. Bauman's statement was in response to that inquiry, and when he undertook to answer, he was bound to tell the whole truth, and was not at liberty to give an evasive or misleading answer, which although literally true, was partial, containing only half the truth, and calculated to convey a false impression. The natural construction which would under the circumstances be put on this statement is that he had \$3,300 capital in the business. It was couched in language calculated to negative the idea that this was merely the gross amount of his assets, and that he owed debts to the extent of two-thirds of the whole of that amount. Such a statement, made under the circumstances it was, might fairly and reasonably be understood as amounting to a representation that he had that amount of capital which was and would remain available out of which to collect any debt which he might contract with plaintiff. We think this is the way in which men would ordinarily have understood it. It is immaterial that more explicit inquiries by plaintiff would have disclosed the fact of his indebtedness. It does not lie in Bauman's mouth to say that plaintiff relied too implicitly on this general statement. To tell half a truth only is to conceal the other half. Concealment of this kind, under the circumstances, amounts to a false representation.

[Minor matters omitted.]

Order affirmed.

Bohen v. City of Waseca.

BOHEN v. CITY OF WASECA.

(28 Minn. 176.)

Municipal corporation — defect in street — dangerous evening.

A city given by its charter the "care, supervision and control" of its streets, may be liable for an injury to a traveller from an unsafe awning over a sidewalk, although the council has failed to pass any ordinances prohibiting or providing for the abatement of such nuisances

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

C. K. Davis, for appellant.

Collister Bros. and Lewis & Leslie, for respondent.

BERRY, J. The charter of the city of Waseca (Sp. Laws 1881, chap. 47), provides in section 5 of subchapter 6, that "the common council of said city shall have the care, supervision and control of all the highways, bridges, streets and alleys, and public grounds within the limits of the city." Section 4, subchapter 5, constitutes the city one road district, section 1 of the same subchapter confers upon the common council power to levy taxes to raise a general fund for city purposes, and to expend any portion of the same for the improvement of the streets of the city; and section 5 empowers the council to assess and levy highway labor and taxes, and to direct the street commissioner when, where, and how to expend such labor and taxes. As respects their effect upon the liability of the defendant city, these provisions are substantially the same as those of the charter of the city of Minneapolis, considered in *Shartle v. City of Minneapolis*, 17 Minn. 284, 308, and held to confer upon such city the exclusive care and control of its streets, and to provide it with means for that purpose. It was said in that case by Mr. Justice McMILLAN to be "well settled that a municipal corporation having the exclusive control of the streets and bridges within its limits at least, if the means for performing the duty are provided or placed at its disposal, is obliged to keep them in a safe condition, and if it unreasonably neglects this duty, and injury re-

sults to any person by this neglect, the corporation is liable for the damage sustained." The same doctrine was applied to the case of a sidewalk in *Moore v. City of Minneapolis*, 19 Minn. 258, 300. These two cases are in point in the case at bar, and they show that it is the charter duty of the defendant city to use reasonable diligence to keep its streets and its sidewalks — which are but parts of streets, *Furnell v. City of St. Paul*, 20 Minn. 101, 117, in safe condition for use, and that it is liable to those injured by its neglect of such duty.

The injury for which plaintiff seeks redress in this action was occasioned by the falling upon him of a wooden awning, overhanging the sidewalk of a public street in the defendant city. The plaintiff alleges that from the manner of its construction and from decay, the awning was, and for a long time had been, in a condition dangerous and unsafe to passers upon the sidewalk. There is no sound reason why the duty of a municipal corporation to keep its streets "in safe condition" should not require it to take reasonable precautions against dangers from overhead as well as underfoot. If an awning in a condition dangerous and unsafe to passers beneath it is permitted to overhang a public street, it cannot be said that the street is in a safe condition. The danger and the unsafety may be as great and the consequences as injurious as in the case of a defect in the surface of the street; and the liability of cities for injuries occasioned by the fall of dangerous and insufficiently supported structures, which have negligently been permitted to overhang a street, has been accordingly maintained in many decided cases. *Drake v. City of Lowell*, 13 Met. 292; *Day v. Milford*, 5 Allen, 98; *Hume v. Mayor of New York*, 74 N. Y. 264; *Grove v. Fort Wayne*, 45 Ind. 429; s. c., 15 Am. Rep. 262, and cases cited; 2 Dill. Mun. Corp., § 1013.

It is however contended by the defendant's counsel that section 2, subchapter 4, of defendant's charter (in subdivision 13) gives the common council authority, by ordinance, to remove and abate every nuisance, obstruction, or encroachment upon the streets and highways of said city; that the legislature has thus confided a discretion to the council, instead of imposing on it a duty; that the city had no right to remove an awning except by means of an ordinance, either general or particular; and that in the absence of such an ordinance the city is not liable. We do not agree to this. In the first place, the position that the remedy by ordinance is exclusive

is an assumption wholly unwarranted by the charter. There is nothing whatever to show that the general "care, supervision and control" of all the highways and streets in the city, imposed upon the council, is limited by the provision cited from section 2. Neither is it reasonable to suppose that it was ever contemplated that the removal or abatement of a particular nuisance, obstruction, or encroachment upon the streets or highways of the city, often demanding immediate action, should await the passage of a city ordinance. In all probability the principal if not the sole purpose of subdivision 13 was to empower the council to make general rules regarding such removal or abatement. In the second place even if the remedy by ordinance were exclusive, then whether the council could be compelled to pass one or not it would be clear negligence not to do so. The council being charged with the care, supervision, and control of the streets, it is their duty to exercise the same in such manner as they are empowered to do, whether by ordinance or otherwise.

These remarks are equally applicable to the eleventh subdivision of section 2 (above cited), by which the council is authorized by ordinance, to "regulate and keep in repair * * * sidewalks, * * * and to prevent * * * any person obstructing the same."

It appears from the complaint that the defendant became a corporation, February 23, 1881; that the injury complained of occurred on January 20, 1883; and that at that time, and for a long time before, and to the defendant's "full knowledge," the awning had been dangerous and unsafe. This state of facts is a sufficient answer to counsel's suggestion of hardship in imposing an immediate liability upon municipal corporations for defects in streets and sidewalks which they have inherited from their predecessors. The law requires reasonable diligence on the part of the corporation, and while this would not impose a liability immediately upon organization, without reasonable time to ascertain and to remedy defects, it certainly would embrace such a case as is made by the complaint in this instance.

The complaint states a cause of action, and the order overruling defendant's demurrer is accordingly affirmed.

Judgment affirmed.

DICKINSON, J., took no part.

CAMPBELL V. CITY OF STILLWATER.

(38 Minn. 308.)

Negligence — proximate cause.

Where a horse is frightened by a moving street car and runs away, and the driver is injured by collision with a dangerous obstruction in the street, the obstruction is the proximate cause. (*See note, p. 569.*)

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment on demurrer below.

J. N. & I. W. Castle, for appellant.

A. E. Macartney, for respondent.

GILFILLAN, C. J. According to the complaint, the railway company, with the consent and permission of the defendant, laid its track and operated its railroad alongside of and in places lengthwise upon one of the streets of the city. The track was so constructed that a carriage driven even with care on or over it would be in great danger of being overturned and broken. Without reference to the danger from passing cars and engines, it was a dangerous place for a horse with a carriage to go. There was no fence or barrier of any kind between the part of the street occupied by the track and the part not occupied by it, to prevent horses running over to and upon the track. As the plaintiff, in his buggy, was driving his horse along the street near the said part of it, his horse was suddenly frightened by a car moving along the track, and notwithstanding the efforts of plaintiff to prevent him, ran upon the track where it was laid on and along the street, overturned the buggy, and injured plaintiff.

[Another point omitted.]

The other ground upon which the demurrer was sustained was that the frightening of the horse by the moving car, and not the neglect of the city to properly guard the street, was the proximate cause of the injury. In cases of tort the application in this court of the rule as to proximate cause is this, that where several concurring acts or conditions of things — one of them, the wrongful act

or omission of the defendant — produce the injury; and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury, if the injury be one which might reasonably be anticipated as a natural consequence of the act or omission. In *McMahon v. Davidson*, 12 Minn. 232, 357, it was stated as the rule that it is immaterial how many others may have been in fault, if the defendant's act or negligence was an efficient cause of the injury. In *Griggs v. Fleckenstein*, 14 Minn. 62, 81, the defendant negligently left his horses unhitched in a city street, and they ran away, came into collision with and frightened another team properly hitched, which also ran away, and came into collision with and injured plaintiff's horse. The court held that defendant's negligence in leaving his horses unhitched was the cause of the injury, saying: "The running away of the defendant's team was the efficient cause of the injury to plaintiff's horse, because it put in operation the force which was the immediate and direct cause of the injury." In *Johnson v. Chicago, etc., R. Co.*, 31 Minn. 57, a fire, caused by a spark from defendant's engine, commenced in a pile of corn-stalks negligently left by N. near the track, passed from the corn-stalks to his barn, from his barn to another, and from that to plaintiff's. It was held that the negligence of the defendant in allowing the sparks to escape from the engine was a proximate cause of the injury to plaintiff. In *Nelson v. Chicago, etc., R. Co.*, 30 Minn. 74, which was an action for injuries caused by defendant's failure to fence its road, the rule was stated that "if the injury was one which a man of ordinary experience and sagacity could foresee might probably ensue from a failure to fence, then the damage would be sufficiently proximate and direct to entitle the injured party to recover." This was followed and applied in *Maher v. Winona & St. P. R. Co.*, 31 Minn. 401, in which it was held that the failure to fence the railroad might be the proximate cause of the injury, where the plaintiff's horses, which he was driving along the highway, were frightened by a train of cars passing, got beyond his control, got away from him, ran upon and along the track into a culvert, and one was killed and the other injured. This court sustained an instruction to the jury in the language which we have quoted from the *Nelson* case.

There can be no question in this case but that any one of ordinary experience and sagacity could have foreseen, from the condition in which this street was put by the construction and operating of

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the railroad track along on one side of it, that horses travelling along the remainder of the street might probably be frightened by passing cars, so as to get beyond the control of the driver; and if there was no fence or barrier to prevent, they might, probably, when so frightened, run upon the track and injure the vehicle, or any one riding in it. Such an injury might reasonably be anticipated as a natural consequence, in the condition in which the track was, of the omission to place some barrier to prevent it.

Order reversed.

NOTE BY THE REPORTER.— See note, 47 Am. Rep. 331.

In *Ransier v. Minneapolis and St. Louis R'y Co.*, 32 Minn. 331, in the operation of a freight train in the night, the train broke apart, and the forward part of the train, being afterward stopped, was run into by the detached rear cars, including the caboose, and the conductor, who was in the caboose, was killed by the collision. Evidence considered as showing that the immediate cause of the breaking apart of the train was the letting off of a brake on one of the rear cars from the jar of the car in its motion, the brake being so worn that it would not remain wound up when the car was in motion. The fact that a sudden increase of the speed of the locomotive may have contributed with the defective brake to cause the train to break apart, does not prevent the defective brake being deemed a legal and proximate cause of the result. Considered further, that the stopping of the forward part of the train, and the subsequent collision and injury, may be referred to the defective brake as a proximate cause, within the principle that a wrong-doer is responsible for injuries which might reasonably have been anticipated as a result of his misconduct, the court said: "The subsequent collision is further removed from that cause in the order of events, but is it so in its causal relation? The answer, upon principles recognized as being within the scope of the maxim, *causa proxima non remota spectatur*, is not difficult. The principle is well settled that a wrong-doer is, at least, responsible for all the injuries which resulted as natural consequences from his misconduct—such consequences as might reasonably have been anticipated as likely to occur. *Griggs v. Fleckenstein*, 14 Minn. 31; *Nelson v. Chicago, M. and St. P. Ry. Co.*, 30 Minn. 74; *Johnson v. Chicago, M. and St. P. Ry. Co.*, 31 Minn. 57; *Martin v. North Star Iron Works*, 31 Minn. 407; *Savage v. Chicago, M. and St. P. Ry. Co.*, 31 Minn. 419; *Milwaukee and St. P. Ry. Co. v. Kellogg*, 94 U. S. 469; *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251; *Fairbanks v. Kerr*, 70 Penn St 86; s. c., 10 Am. Rep. 664; *Sheridan v. Brooklyn City, etc., R. Co.*, 38 N. Y. 39; *Lake v. Milliken*, 62 Me. 240; s. c., 16 Am. Rep. 456; *Weick v. Lander*, 75 Ill. 93. And whether the injury in a particular case was such natural and proximate result of the wrong complained of, is ordinarily for the determination of a jury. See cases above cited."

In *Knapp v. Sioux City and P. R. Co.*, Iowa Supreme Court, October 1884, K., a locomotive engineer, was running a train on defendant's road, when by

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reason of the defective condition of the rails, they spread, and a part of the train was thrown from the track, and K., to protect himself and the property under his charge, reversed the lever to stop the train and in so doing broke his arm. K. sued the company for damages, and the court directed a verdict for defendant. *Held*, that it could not be said as matter of law that the negligence of the railroad company was not the proximate cause of the injury, and that the case should have been submitted to the jury. The court said :

"The plaintiff was injured while he was reversing the lever. There is no evidence tending to show that this was rendered more difficult because the train, or a portion of it, was off the track. If the lever had not been reversed, it cannot be said the plaintiff would have been in any respect injured. It must however be assumed that when a train leaves the track, the lives of the employees are endangered. The lever is moved forward, as we understand, for the purpose of starting the train or increasing its speed, and is reversed when it is desired to stop the train as speedily as possible. This forward and backward movement of the lever, no doubt, frequently occurs in a day's run. The use therefore of the lever must be regarded as one of the incidents and hazards of the plaintiff's employment, and for an accident happening by such use, by which the engineer is injured, it will be conceded the defendant cannot ordinarily be held liable. The immediate cause of the injury received by the plaintiff was the reversal of the lever. The lever was reversed because the train left the track, and this was caused by the spreading of the rails caused by the defective condition of the track. There was therefore a combination of immediate causes remotely preceded by others. No event can occur, it is believed, which is entirely independent. 'The links in the chain of causation are endless.' The law has adopted a practical rule that the proximate cause of an injury only can be recognized. When it is ascertained, further inquiry is closed. The real difficulty lies in the application of the rule. An eminent judge has said : 'The general rule of law, we understand, is that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether without the concurrence of both it would not have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had because it cannot be judicially determined that the damage would have been done without such concurrence, so that it cannot be attributed to that cause for which he is answerable.' *SHAW, C. J., in Marble v. City of Worcester*, 4 Gray, 805. The same rule has been more briefly stated by *BECK, J., in Dubuque Wood & Coal Ass'n v. City and County of Dubuque*, 30 Iowa, 176. Conceding this to be a correct statement of the law, we have to inquire whether the District Court correctly applied it to the facts of this case, and we feel constrained to say that in our opinion it did not.

"Ordinarily trains remain on the track. If they do not, it must ordinarily be assumed it was caused by the negligence of some one, unless the accident appears to have been inevitable. In this case it must be assumed that the negligence of the defendant caused the train to leave the track. The plaintiff was called on in a sudden emergency to act. It cannot be expected that he would remain passive. He was justified in so acting as to best protect himself

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and preserve the property under his charge. If he had sprung from the engine to the ground and been injured, he undoubtedly could have recovered, provided he acted prudently in so doing. *Buel v. N. Y. C. R. Co.*, 81 N. Y. 314; *Coulter v. American E. Co.*, 5 Lans. 67. Instead of doing this he concluded to reverse the lever. Now whether this was the proper thing to do, and whether the plaintiff was negligent in so doing, it was for the jury to say. Conceding the plaintiff was not negligent, and that the injury was not received because of inevitable accident, then it must follow the negligence of the defendant caused the injury. True it is that reversing the lever is one of ordinary hazards of the plaintiff's employment; yet if the negligence of the defendant required such act to be done at that particular time, and the plaintiff was not guilty of negligence, but on the contrary acted prudently, with due regard for his own safety and the safety of others, then the defendant is liable, because the negligence of the defendant is the proximate cause of the injury.

"We are unable to distinguish this from the *Squib* case, which was decided years ago, and has been frequently referred to. In that case a squib was thrown from place to place, until finally a person was injured by it. The first person who so threw the squib was held liable for the injury. *Scott v. Shepherd*, 2 W. Bl. 692. Each person subsequent to the first threw the squib to protect himself and his property from injury. So here the plaintiff reversed the lever to protect himself and the property under his charge from consequences which would probably follow the negligent act of the defendant. See also *Pulmer v. Andover*, 2 Cush. 600; *Allen v. Hancock*, 16 Vt. 230; *Woodward v. Aborn*, 85 Me. 271. It may possibly be true, as suggested by counsel for the defendant, that if the plaintiff had been injured as he was while reversing the lever for the purpose of stopping the train to prevent it from running over cattle on the track, the defendant would not be liable, although the cattle got on the track because it was not fenced. It is sometimes exceedingly difficult to determine to which class a case belongs. But there is, and must of necessity be, a dividing line. It may apparently, in some cases, have the appearance of being arbitrary. This cannot be avoided. But we think the failure to fence would be more remote from the immediate cause of the accident than in the case at bar. Besides this, to reverse the lever for such a cause might well be regarded as one of the ordinary hazards."

"Goods were delivered to the defendant steamboat company for transportation. The bills of lading did not designate any particular vessel. The goods were burned on the wharf by a fire not occurring through any neglect of the defendant. *Held*, that where goods in the custody of a carrier are destroyed by storms, floods or fires, in a place in which they would not have been but for the negligent delay of the carrier, the direct or proximate cause of the injury is the flood or the fire, and that the delay in transportation is only the remote cause. The Supreme Court of the United States so decided in *Railroad Co. v. Reeves*, 10 Wall. 190, and it was so held in the Supreme Court of Massachusetts in *Hoadley v. Northern Trans. Co.*, 115 Mass. 304; s. c., 15 Am. Rep. 106. This latter case was a suit to recover for the loss of goods by fire, which the carrier had delayed forwarding, and which were burned at the

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place where they were delivered into his custody. The bill of lading in that case exempted the carrier from liability for loss from fire while the goods were in transit, or while in depots or warehouses or places of trans-shipment. It was held that the destruction of the goods by fire could not reasonably have been anticipated as a consequence of the detention; that the delay did not destroy the goods; and that there was no connection between the fire and the detention. The language of the bill of lading is: 'And it is expressly contracted and agreed that loss or damage by weather, fire, leakage, breakage and dangers of the seas are excepted;' and it seems to me it would be a very strained and forced construction of these contracts now before me to hold that the exemptions in them from 'fire, leakage and breakage' do not apply to losses from these risks while on the wharf, because they are mentioned in the same sentences with other risks, which are only encountered on the voyage itself. See 8 Wall. 107; Rev Stat., § 4282. *Scott v Baltimore*. Cir. Ct. Md., January 15, 1884."

In *Spaulding v. Winslow*, 74 Me. 583, the court said: "The plaintiff was travelling with horse and wagon upon a road in the town of Winslow, when his horse took fright at a hole, or at the fresh covering of a hole, in a culvert crossing the road, and by the conduct of the horse the wagon was carried into the ditch, the plaintiff was thrown therefrom, and thereby received a personal injury. The plaintiff alleges that the road was defective for not having a railing between the traveled way and the ditch adjoining.

"A question arises, whether the fright of the horse should be considered the legal cause or any part of the legal cause of the accident. It is admitted that the hole, or temporary repairing of the hole, had not existed twenty-four hours before the accident happened. Inasmuch as the town would not be liable, as the law then stood, for an injury caused by a defect of which the municipal officers of the town had not twenty-four hours' actual notice, it is contended by the defendants, that if the hole in the culvert had any force or influence in causing the injury, the plaintiff cannot recover. In other words, one of the positions of law relied upon by the defendants is, that the town is to be regarded as being in the same or as good a condition and position as if no hole in the culvert had ever existed. In still another way the idea may be as well expressed. The town says, we were not responsible for the hole in the culvert, and if the hole had not been there, the accident would not and could not have happened. Therefore the defect for which we were not responsible must, *ex necessitate*, be considered to be the legal cause of the accident.

"We do not concur with the defendants in this view. We think the only purpose of the statute was to screen a town, not having the twenty-four hours' notice, from the consequences of a defect, in cases where the defect operates as a proximate cause of an injury. Our judgment is that the hole in the culvert might be an object or thing without the existence of which the accident could not have happened, and still be no part of the legal cause of the accident. It might have its remote and indirect influence in the same manner that many other objects and things, which are not defects upon a highway, would have in many cases. The statute declares that under the circumstances in proof the hole in the culvert shall not be regarded as a defect. So the law

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says a bit of white paper shall not be. But the hole or the paper may be the remote, and some real defect be the proximate cause of an accident.

"Suppose, in the case at bar, the horse had not been affrighted, but the driver, using due care, had, under some misjudgment or miscalculation in driving by the hole, or in passing another team at the place of the hole, caused his team to be upset at the side of the road, where there should have been a railing, and such an accident would not have occurred but for the hole in the culvert. We think in that case the hole in the culvert could not be considered as the real and legal cause of the accident. Everything which induces or influences an accident does not necessarily and legally cause it. In the case supposed, the unrepaired or improperly repaired culvert would have an accidental and casual but not a causal connection with the accident. It might be the 'agency,' or 'medium,' or 'opportunity,' or 'occasion,' or 'situation,' or 'condition,' as it is variously styled, through or by which the accident happened; but no part of its real and controlling cause. It would be the remote, but not the proximate cause. *O'Brien v. McGlinchy*, 68 Me. 557.

"Here then must be the proper distinction. If the hole, or the horse's fright at the hole, was the proximate cause of the injury, the plaintiff cannot recover. If it by chance became merely an agency through which another defect operated to produce the injury, then he can recover.

"Now whether the fright of the horse at the hole shall be regarded as the true and real cause of the accident, or only a circumstance which permitted it to happen, must depend upon the extent of the misconduct of the horse. If the horse became by fright unmanageable, substantially freeing himself from the control of the driver, and the upset ensued from such unmanageableness, then the fright of the horse should be regarded as a proximate cause, or one of the proximate causes, of the accident. The legal condition of the case would be essentially or precisely the same as existed in the cases cited. *Moulton v. Sandford*, 51 Me. 127; *Perkins v. Fayette*, 68 Me. 153; s. c., 28 Am. Rep. 84. There were two causes in those cases to produce the accident, for one of which the town was not legally responsible. So in the case at bar, under the conditions assumed, two proximate causes would exist, or if only one existed, then the fright of the horse would be the sole cause of the accident.

"If however the horse, while being properly driven, upon sight of the hole suddenly started or shied, and swerved or sheered a few feet from the direct line of travel, and through only a momentary loss of control by the driver, threw the wagon into the ditch on account of the want of a railing, and the road was defective for want of a railing, in such case the misadventure of the horse should not be considered as causing the accident. Every irregularity in the movement of a horse is not imputable to some fault or vice. Perfection of conduct is not to be expected. We think it was correctly said by CHAPMAN, J., in *Titus v. Northbridge*, 97 Mass. 266, that 'a horse is not to be considered as uncontrollable that merely shies or starts, or is momentarily not controlled by the driver.'

"It is not a fault in a horse to be spirited, or to start up quickly, or to shy and sheer from objects to a certain extent. Such things are very common

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occurrences, and are to be looked for and expected in the use of horses, and cannot be prevented or effectually guarded against by the owners or drivers of horses. It is not unreasonable to drive horses of such description upon our public roads. Therefore it would not be reasonable to say that the fright of the horse, under such circumstances and conditions as we are now assuming hypothetically to be true, was a proximate cause of the plaintiff's injury. There can be no fixed rule defining proximate cause. Much must depend upon the circumstances of each particular case. *Page v. Bucksport*, 64 Me. 58; s. c., 18 Am. Rep. 389.

"And much depends upon the common sense of the thing. *Wiley v. Belfast*, 61 Me. 575.

"It is not an easy thing to establish a general rule as to what may be considered unmanageableness of horses, and much depends upon the circumstances of each case that arises. The distinctions which we make in this case are well established by the cases in Massachusetts and elsewhere. *Titus v. Northbridge*, *supra*; *Stone v. Hubbardston*, 100 Mass. 49; *Cushing v. Bedford*, 125 Mass. 526; *Wright v. Templeton*, 182 Mass. 49; *Hey v. Philadelphia*, 81 Penn. St. 50; *Kennedy v. New York*, 78 N. Y. 865; s. c., 29 Am. Rep. 169; *Nichols v. Brunswick*, 8 Cliff. 81; 2 Thomp. Neg. 1207, and cases in note."

Where one's house was set on fire by sparks negligently emitted from a locomotive engine, and in endeavoring to extinguish the fire his hand was burned, *held* not the direct result of the negligence. *Hinchey v. Manhattan Ry. Co.*, 49 N. Y. Super. 406.

Where a fence along a railway has been removed, so that live stock stray upon the road and are killed by a passing train, such killing is not the direct consequence of the removal of the fence. *Railroad v. Guthrie*, 10 Lea, 482.

In *Gould v. Chicago, B. & Q. R. Co.*, Iowa Supreme Court, July 23, 1885, the conductor of a freight train neglected to give the usual signal to the engineer when passing a station, when the engineer leaned out of his engine to look for the signal, when his head struck against a water-crane near the track and he was killed. *Held*, that the negligence of the conductor was not the proximate cause of the accident, and that the railroad company was not liable. The court said: "The failure of the conductor to give the signal was undoubtedly negligence; but it is plain that it was not the proximate cause of the injury. Indeed, the failure to give the signal did not cause the intestate to expose himself to the danger of the water crane by looking for the signal. He acted as he did for the purpose of discovering the signal, and had it been given, he would, notwithstanding, have met with the accident. The failure to make the signal did not require him to expose himself to danger. It was his duty to look for it, whether it was given or was not given, and the result would have been alike in each case. It therefore cannot be said that the negligence of the conductor in failing to give the signal was the proximate cause, or one of the proximate causes, of the injury."

See *Turner v. Buchanan*, 82 Ind. 147; s. c., 42 Am. Rep. 485; *Henney v. Davis*, 98 Ind. 452; s. c., 47 Am. Rep. 878; *Forney v. Gildmacker*, 75 Mo 113; s. c., 42 Am. Rep. 388; *Ring v. City of Cohoes*, 77 N. Y. 88; s. c., 33 Am. Rep. 574; *City of Galveston v. Posnainsky*, *ante*, p. 517.

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STATE V. STATE MEDICAL EXAMINING BOARD.

(35 Minn. 324.)

Constitutional law — regulation of physicians.

The State may authorize the State Medical Board to refuse a certificate, as a necessary condition to the right to practice medicine, for "unprofessional or dishonorable conduct," but the applicant has a right first to be heard, and is not entitled to *mandamus* to review the determination.

MANDAMUS. The opinion states the case.

Sleeper & Donaldson, for relator.

W. J. Hahn, attorney-general, for respondent.

DICKINSON, J. The relator seeks by *mandamus* to compel the State Medical Examining Board to issue to him the certificate required by chapter 125 of the laws of 1883, to authorize him to practice the profession of a physician in this State. He has appealed from an order of the District Court quashing an alternative writ.

The act referred to creates a board of medical examiners, consisting of the faculty of the medical department of the university of Minnesota. It requires all persons, except such as have been practicing medicine five years within the State, as a condition of the right to practice, to procure from this board its certificate or diploma. "Graduates in medicine" are to receive a certificate, upon their diploma being presented to the board and found to be genuine. Other applicants for certificates are required to pass a satisfactory examination before this board. Section 9 of the act contains this provision: "The board of examiners may refuse certificates to individuals guilty of unprofessional or dishonorable conduct, and they may revoke certificates for like causes."

It appears that the relator applied for a certificate from the board, presenting a diploma, which was found to be genuine, showing that he was a graduate of the Louisville (Kentucky) Medical College, in which institution he had passed the prescribed course of study. His application was refused only upon the ground, that as the board considered and determined, the relator was guilty of unprofessional

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and dishonorable conduct, and was at that time conducting himself in an unprofessional and dishonorable manner, in advertising himself through the newspapers and by circulars to be a medicine man of the Winnebago tribe of Indians, adopted by that tribe, and assuming the name of "White Beaver," and claiming in such publications the proprietorship of certain specific remedies, one of which he claimed would cure cholera morbus when taken internally, and rheumatism when applied externally; which claims are alleged by the respondents to be untrue and impossible.

We first consider the question as to the constitutionality of that part of the act (section 9) upon which the refusal of the board to grant its certificate is based. The relator urges this objection upon the grounds that the act gives to the applicant no opportunity to be heard in his own defense in relation to any charge of unprofessional and dishonorable conduct, and that by its enforcement he is deprived of his property without due process of law. These objections to the validity of the act cannot be sustained. The vocation of the physician is in itself a lawful one, and the right of any person to engage in it is only subject to such restrictions as the legislature may impose in the exercise of its general police power. While therefore the right to engage in this practice is a qualified one, even that qualified right is not to be arbitrarily, and without reason, denied. It is so opposed to the principles of the common law that any fact affecting the rights of an individual shall be investigated and determined *ex parte*, and without opportunity being afforded to the party to be affected thereby to be heard (4 Bl. Com. 282, 283; *State v. Bryce*, 7 Ohio [pt. 2], 82; *Murdock v. Phillips Academy*, 12 Pick. 244), that this act should not be construed as contemplating such a proceeding unless that purpose is expressed in the plainest terms. While the act does not prescribe the manner in which the proceedings for the determination of the matters referred to in section 9 shall be conducted, there is nothing to indicate that it was intended that such investigations, and the determination of the fact, should be made *ex parte*, or without reasonable opportunity given to the party interested to be heard. The contrary conclusion is rather indicated by the requirement that the board shall "take testimony in all matters relating to its duties," and by the fact that a right of appeal from the determination of the board is conferred.

It may be stated as a general proposition that any person has the

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right to pursue any lawful calling, but in respect to certain occupations, not in themselves unlawful, this right is necessarily subject to legislative restrictions from considerations of public policy. In the profession of medicine, as in that of the law, so great is the necessity for special qualification in the practitioner, and so injurious the consequences likely to result from a want of it, that the power of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties, cannot be doubted. *Hewitt v. Charier*, 16 Pick. 353; *Spaulding v. Alford*, 1 Pick. 33; *Wright v. Lanckton*, 19 Pick. 288; *Cooley*, Const. Lim. 745. Statutes for the accomplishment of this purpose have been very common, containing provisions similar to those found in this act; that is, requiring, as a condition of the right to practice the profession, that the practitioner shall be a graduate of an institution for medical instruction, or shall have a certificate of his qualification from some recognized body of men learned in the science. Such requirements have been incorporated into the laws of Massachusetts, Maine, New York, Ohio, Illinois, Alabama, Georgia and Texas, and probably in other States, and their validity has never, we think, been judicially denied; nor as we understand, does the relator question it here.

But the legislature has surely the same power to require, as a condition of the right to practice this profession, that the practitioner shall be possessed of the qualification of honor and a good moral character, as it has to require that he shall be learned in the profession. It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be intrusted with the discharge of its duties. And as the duty of determining upon these qualifications, both as to learning and skill, and as to honor and moral fitness, must from necessity be committed to some person or body other than the legislature, we see no reason why it may not be committed to the legally constituted body of men, learned in this profession, named in this act.

We are referred to no decision, and we have found none, sustaining the position of the relator, that an adverse determination of such a body upon such a question, by reason of which the applicant is precluded from engaging in the practice of his profession, deprives

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him of his property without due process of law, or that such enactments are for any reason unconstitutional. On the contrary, such enactments have been repeatedly enforced, and their constitutionality sustained, in cases involving a consideration of those provisions relating to the mode of determining the qualification of the practitioner in respect to learning. See cases above cited; also *Thompson v. Staats*, 15 Wend. 395; *State v. Goldman*, 44 Tex. 104; *Richardson v. Dorman*, 28 Ala. 679; *Bibber v. Simpson*, 59 Me. 181.

The legislative requirement of a good moral character has also been sustained. *Thompson v. Hazen*, 25 Me. 104. See also *Wert v. Clutter*, 37 Ohio St. 347, 349. As has been already suggested, there can be no distinction, upon constitutional grounds, as to the mode of determining in regard to professional or intellectual fitness, and as to moral fitness for the profession. The means properly adopted by the legislature to determine the one cannot be said to be unconstitutional when prescribed for the determination of the other.

We will add, as our construction of the words "unprofessional or dishonorable conduct," as used in section 9, that we do not think that the legislature contemplated matters of merely professional ethics, but that the term "unprofessional" was used convertibly with "dishonorable." The meaning may be expressed by using the conjunctive "and" in place of the disjunctive "or." *Wert v. Clutter*, 37 Ohio St. 347-350; *Weston v. Loyhed*, 30 Minn. 221. It might for instance, be deemed unprofessional for the members of one school of medical practice to consult professionally with a member of a different school; but such matters are not within the plain purpose of the act, which was the affording of protection to the people against ignorant, unqualified, and unworthy practitioners of this profession.

Our conclusion being that the law under which the board acted was constitutional, it is apparent that the relator cannot, by *mandamus*, compel the issuing of a certificate to him. The action of the board is not merely ministerial, but partakes of a judicial character. It is to inquire concerning and to determine as to the existence of certain facts, and whether it should grant a certificate of qualification to an applicant must depend upon that determination. The board has not refused or neglected to act upon the matter submitted to it. It has decided upon the application, and the correctness of that decision, involving the exercise of the judgment

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of the members of the board, cannot be brought into review by this proceeding, and is not properly before us. *King v. Licensing Justices*, 4 Dowl. & R. 735; *King v. Sheriffs of York*, 3 Barn. & Adol. 770; *Howland v. Eldredge*, 43 N. Y. 457. See *Matter of Dorsey*, 7 Port. (Ala.) 293; *People v. Judge of Wayne County Court*, 1 Mich. 359; *Hoole v. Kinkad*, 16 Nev. 217.

Order affirmed.

IN RE BESONDY.

(23 Minn. 385).

Guardian and ward — allowance for expenses without order.

A guardian or parent may be reimbursed for necessary expenses incurred in the support of a ward and child, before any order is made therefor by the court, and before the appointment of the guardian.

THE opinion states the case.

Charles C. Wilson, for appellants.

Jones & Gove, for respondent.

VANDEBURGH, J. Upon the trial in the District Court, upon appeal from the Probate Court, it appeared that the father of the respondent, John W. Perry, died in 1863, in the service of the United States, leaving him surviving the respondent, an infant of the age of three years, and his widow, Louisa J. Perry (who, in September, 1864, was married to Charles Besondy), and thereupon the respondent became entitled to a pension from the United States government, which was duly drawn for him and retained by one Cundiff, acting for him until the appointment of his mother as guardian, which was duly made by the Probate Court of Olmsted county on the 29th day of January, 1870, and thereafter she drew the pension money accruing to him until her death, May 2, 1874, and also recovered from Cundiff the money received by him therefor, amounting in all to the sum of \$1,138.40. As respects the support and maintenance of the respondent, it appears, that soon after the second marriage of his mother, it was arranged between her and Besondy that he should live with them and be supported

as one of the family, and that the pension money should be applied and used in payment therefor. He accordingly lived with them, and was so supported as one of the family, both before and after her appointment as guardian, until her death. The reasonable value of his maintenance to the time of her appointment as guardian was found to have been the sum of \$772.75. In adjusting the account of the administrator of the guardian with the respondent, the court finally rejected the claim for the support of the ward prior to the appointment of the guardian, but allowed the amount claimed and found to have been necessarily incurred for his subsequent maintenance, and thereupon found the respondent entitled to a balance, on account of pension money received by her, of \$645.40, with interest from the date of her death.

The question here to be determined is whether the guardian should also be credited with the amount found to be the reasonable value of the maintenance of the respondent prior to the date of her appointment. The respondent appears to have occupied the same relation to his mother and stepfather before as after her appointment. The arrangement made with the stepfather, though invalid as a contract, is sufficient to rebut the presumption that he took the child into his family to support *in loco parentis*, and on account of his tender years he could render no service in return for such support. The obligation of parents to support their minor children having a separate income is thus summarily stated: "The father is bound to support his minor children if he be of ability, even though they have property of their own; but this obligation in such a case does not extend to the mother." 2 Kent Com. 191. In other words the rule is not so rigorous in the case of the mother; and if the child has property the mother is not bound to provide for its maintenance where the father would be. 1 Pars. Cont. 309. And a widow, upon her marriage to a second husband, is not liable for the support of her minor child, but is entitled to have his income applied thereto. Pub. Stat. (1858) chap. 15, § 2; Gen. Stat. 1878, chap. 15, § 2; Willard Eq. Jur. 629; *Wilkes v. Rogers*, 6 Johns. 568, 594. And a stepfather is of course not bound to maintain the children of his wife by a former husband. But if he voluntarily assume the parental relation and receives them into his family under circumstances such as to raise a presumption that he has undertaken to support them gratuitously, he cannot afterward claim compensation for their support.

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We think it must be admitted that neither Besondy nor his wife was legally bound to support the respondent during these years, and it is quite clear that they furnished such support under the circumstances with the expectation of being reimbursed out of his income, and not as a gratuity. That such application of the bounty of the government, which was doubtless intended for such purposes, was proper in this case, the court must have considered in its allowance of the amount found due for past maintenance, covering the time of the guardianship. But why should the line be drawn at that point and the account for expenses theretofore incurred be rejected? There is no difference in the equitable charter of these claims and we do not think the law recognizes any. No such distinction was recognized by the Court of Chancery, which exercised jurisdiction in such cases. In this State the jurisdiction exercised formerly by the Court of Chancery as respects the care of infants and their estates, and for the appointment and supervision of guardians, belongs to the Probate Court. *State v. Ueland*, 30 Minn. 277; Willard Eq. Jur. 623, 624. And we think there is no more reason why, in a meritorious case, an appointment as guardian should necessarily precede the necessary expenditures in behalf of an infant by a parent or other person who is not lawfully bound for his support, in order to make them a proper charge upon his estate, than that such person should, under the chancery jurisdiction, have been compelled to have first brought suit to obtain the proper order or direction of the court in the premises; and upon this point Chancellor KENT, in *re Bostwick*, 4 Johns. Ch. 100, 105, says: Any other rule "would lead to great inconvenience, for though the wants of an infant might be ever so pressing, he could not receive any maintenance (charity excepted) without the expense of a suit and reference to a master."

Though it is doubtless the safer rule, when practicable, that a guardian should first be appointed and a preliminary order obtained, yet it is not indispensable. The courts are not controlled by these formalities, but consider especially the welfare and interest of the child rather than the accumulation of his income. And the rule permitting an allowance for past maintenance in any case has this safeguard, in that whatever amount the parent or other person may have expended for such purpose the court must inquire into the facts and allow only such sums as are reasonable and proper under the circumstances. The claim must be limited to necessary expendi-

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tures. *Bond v. Lockwood*, 33 Ill. 212. It is well settled that a guardian may support his ward without any order of court, and all payments necessarily made for such purpose will be allowed him. And in like manner any one in possession of the infant's property, or a stranger, may maintain him and be allowed therefor such sum as can be shown to be reasonable and proper. Macpherson Infants (Law Lib. N. S.) 213 ; *Bond v. Lockwood*, *supra*. As before intimated the law shows special favor to the mother, and her application for past maintenance will be granted in cases where that of a father would not be listened to. This, we apprehend, grows out of her naturally dependent position, and of the consequent reluctance of the courts to encroach upon her estate. We do not however undertake to say that her affirmative application for past maintenance will in all cases be granted when the child has property of his own, though his support was not intended to be a gratuity. The circumstances of the case might be such as to render it altogether inequitable. Here however there is no suggestion that the claim is not equitable, or that the mother had a sufficient estate of her own ; but the record, we think, warrants a contrary inference. The courts are not, ordinarily, careful to require of a mother who remains unmarried, as in the case of a father, that a special case be made, showing the inadequacy of her own means, and the necessity of an allowance for that reason. Much less would such a showing be required of a mother who was remarried, and ceased to be liable for the infant's support. Macpherson Infants, 224, and cases ; *Bruin v. Knott*, 12 Sim. 436 ; *Haley v. Bannister*, 4 Madd. 275 ; Schoul. Dom. Rel. (3d ed.), § 239 ; Willard Eq. Jur. 639 ; *Mowbry v. Mowbry*, 64 Ill. 383. Where any question is made as to the good faith, or amount or equity of the claim, the investigation will naturally develop into an inquiry into all the facts and circumstances material to a just determination of the case. *In re Cottrell's Estate*, L. R., 12 Eq. Cas. 566.

We are unable therefore to discover any good reason why the administrator should not be entitled to be allowed for the maintenance of respondent, as well before as subsequent to Mrs. Besondy's appointment as guardian, by way of set-off against his claim. The money was received by Besondy and his wife, he joining in the receipt therefor, and its equivalent and more had been expended by them for his support.

[Minor matters omitted.]

Judgment reversed and new trial ordered.

State v. Horan.

STATE v. HORAN.

(38 Minn. 394.)

Criminal law — evidence — declarations — res gesta.

Where one was robbed, his declarations of the circumstances very soon thereafter are competent evidence.*

CONVICTION of robbery. The opinion states the case.

O'Brien, Eller & O'Brien, for appellants.

W. J. Hahn, attorney-general and *J. J. Eagan*, for respondent.

VANDEBURGH, J. The defendants were tried and convicted of the crime of robbery, in the District Court of Ramsey county. The most material question of fact arising on the trial was the identification of the defendants by the prosecuting witness. It appeared from his testimony that while returning to his home on John street, in St. Paul, at about 10 o'clock in the evening, he was assaulted and robbed by two men, strangers to him, whom he had observed standing on the side of the street in advance of him. It was a bright night and the street lamps were also burning, and his house was in sight near by. Before he was attacked he saw both assailants distinctly. He was thrown down and held fast, while his pockets were searched by them. He had an opportunity to observe the face and features of each, and endeavored as well as he was able to fix in his mind a correct impression thereof. After the robbery they fled, and he gave the alarm, ran to the house of a neighbor near by, who notified the police by telephone and went with him to the place of the robbery, where witness found his hat and cane. He then went to his own house, and in a few minutes a policeman came, to whom he immediately gave a description of the men who had robbed him. The witness also testified on the trial that he recognized his assailants the next morning at the police station, and identified these defendants as the guilty parties.

The evidence of the description of the men given by the witness to the policeman at his house was received, against the objection of

*See *Kirby v. Commonwealth* (77 Va. 681), 46 Am. Rep. 747; *City of Galveston v. Barbour*, ante, p. 519.

the defendants, and it is insisted that this ruling was error. It is claimed on behalf of the State that the statements of the witness were made in close connection with the events which had transpired, and under the pressure of the excitement occasioned thereby, and were properly received as a part of the *res gestæ*. Upon this subject the authorities are not uniform. Some courts are inclined to hold the rule with much strictness as to the time and circumstances under which the statements proposed to be shown are made, while others allow a wider range for its application, leaving it to be applied largely in the sound discretion of the trial court. 15 Am. Law Rev. 85; *Com. v. Densmore*, 12 Allen 535; *People v. Davis*, 56 N. Y. 95; *Com. v. McPike*, 3 Cush. 181; *Insurance Co. v. Mosley*, 8 Wall. 397; *O'Connor v. Chic. M. & St. P. Ry. Co.*, 27 Minn. 166.

Our examination leads us to conclude, that especially in cases of tort involving personal injury, the weight of authority in this country is in favor of allowing evidence of the declarations or statements of the injured party, touching the cause or circumstances of the injury, made so soon after the event, and under such circumstances, as to warrant the trial court in presuming that they grew out of and were dependent upon it, and could not have been devised or contrived by the declarant for his own purposes. *Insurance Co. v. Mosley*, 8 Wall. 397; *Harriman v. Stowe*, 57 Mo. 93; *Driscoll v. People*, 47 Mich. 413; *Jordan v. Commonwealth*, 25 Gratt. 943; *People v. Vernon*, 35 Cal. 49; *Burns v. State*, 61 Ga. 192; *Augusta Factory v. Barnes*, 18 Rep. (Ga.) 105. In the last case the party was severely injured while employed in a factory. She was removed to her home, and about one-half hour after, while enduring severe bodily suffering, which had continued in the interval, she made a statement to her father of the particulars of the cause of the accident, which the court held proper to be received as part of the *res gestæ*.

In *O'Connor v. Chicago, etc., R. Co.*, 27 Minn. 173, this court, after reviewing the cases and in considering this subject generally, say "that a considerable time may elapse, and yet the declaration be a part of the *res gestæ*," and "that each case must depend on its own peculiar circumstances, and be determined by the exercise of sound judicial discretion."

In the case at bar the witness had been waylaid and robbed. He had suffered personal violence. A great crime had been committed. He had specially observed and marked his assailants at the time.

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And while great care and discrimination should be exercised in receiving evidence of this kind, we are unable to say that the court erred in its judgment in this case in admitting the evidence in question. It might be considered that when the declarant thus described the men who had assaulted him, whom it appeared he had never before seen, his mind was still so occupied and absorbed with his exciting and hazardous experience as to maintain for so brief a period a close and natural connection between the event and his statements to the officer, and that hence such statements would be the direct and natural outgrowth of the robbery and its concomitants, and they would derive a special credit from that fact (though they would otherwise be hearsay), and would also be relieved from the suspicion of device or after-thought. See Whart. Ev., § 259 ; 1 Greenl. Ev., § 108. It was clearly competent for the witness to testify that he recognized and identified the same parties the next morning at the police station, and the particulars of such identification were properly received.

We see no error or abuse of discretion in the refusal of the court to grant a new trial on the ground of newly-discovered evidence.

Order affirmed.

DAHLBERG V. MINNEAPOLIS STREET RAILWAY COMPANY.

(23 Minn. 404.)

Negligence — contributory — hand out of car window.

Where a passenger on taking his seat in a street car rested his hand partly outside an open window, and it was immediately struck by some upright sewer planks close to the car, *held*, that the question of contributory negligence was for the jury. (*See note, p. 589.*)

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

Wilson & Lawrence, for appellant.

Merrick & Merrick, for respondent.

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VANDEBURGH, J. This action is for damages for injuries received by plaintiff while a passenger upon one of the defendant's street cars, in the city of Minneapolis. The accident occurred from the contact of plaintiff's hand, which was partly outside the open car window, with upright planks placed by the city near the track while in the construction of a sewer across the street and under the track. The evidence is conflicting as to the degree of proximity of the sewer planks to the body of the passing car, but we think there was evidence in plaintiff's behalf, for the jury, tending to show that the car ran very close and within less than an inch of them. These planks were erected each side of the sewer, about three feet apart, and were for the purpose of preventing the earth from caving in during the progress of the work. The plaintiff states in his testimony that he entered the car, proceeded to the front to pay his fare, got change in an envelope, and went back and sat down, and says, "I put my hand like this on the window" (illustrating by putting his hand on the arm of a chair, with the fingers on the outside). "I was hardly sitting down before I was struck by the planks." He also testified that his hand was caught and turned around by the first plank and his arm broken by the second plank, and that his hand was first struck on the knuckles.

"The car was going pretty fast — trotting." On cross-examination he said: "I walked back from the front of the car to the second window; I had the envelope in my fingers and put it out; I did not throw it out; I put my hand out just far enough to let the envelope out; I was partly sitting down before I was struck with the first plank; my hand was caught just as I sat down." The sewer planks had just been put up, and the driver of the car had not previously passed them. He had sole control and management of the car, and according to plaintiff's evidence he did not stop or slacken its speed on approaching the sewer. It does not appear that plaintiff had any notice of the obstruction.

[Minor matter omitted.]

The principal question in the case is presented by the defendant's exceptions to the rulings of the court upon the question of the plaintiff's alleged contributory negligence in temporarily extending his hand or fingers over the edge of the window-sill. The court charged the jury that "as a general proposition of law, if a man should thrust his hand outside of a car window carelessly and negligently, so as to come in contact with an object which was at a reasonably safe

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distance from the car, and should be injured, and he would not have been injured but for that negligent act on his own part, he could not recover at all." But if the plaintiff simply put his hand upon the window-sill as he sat down, and as described in plaintiff's testimony, the windows being open, though his fingers were beyond and outside of the window, "if the accident occurred in that way, and that was all he did," it was not, in the opinion of the court, negligence in law. The court further instructed the jury that he was bound to do what a person of ordinary prudence would do, and nothing more, "and he is liable for contributory negligence if he did in this instance what a person of full age and discretion, and ordinary intelligence, care and prudence should not have done." The court therefore left the question to the jury, and refused to charge the jury, as requested by defendant's counsel, that if the jury believed that if the plaintiff's arm or hand was outside the window when the injury occurred he could not recover.

We are not prepared to say, assuming plaintiff's version of the case to be true, that the court erred in holding that if the conduct of plaintiff was negligent, it was an inference to be drawn by the jury and not by the court. By this the court did not imply that plaintiff's conduct was not negligent, but that it was not necessarily or conclusively such. A very careful or thoughtful person would be likely to refrain from such an act, while it is not so clear that in the judgment of a majority of ordinarily prudent men, the conduct of the plaintiff, as testified to by him, would in itself be careless or unauthorized. A passenger is to be allowed a reasonable measure of liberty in the position assumed by him in taking or occupying his seat. He is expected to exercise care commensurate with the danger to which he may be exposed; but the degree of care to be exercised on a particular occasion is generally a question of fact for the jury. *Stackus v. N. Y. C. & H. R. Co.*, 79 N. Y. 464. Thus whether the act of standing on the platform of a street car, or getting on or off such car while in motion, is negligence, is held usually to be for the jury under the circumstances of each case. *Whart. Neg.*, §§ 365, 370; *Messel v. Lynn & B. R. Co.*, 8 Allen, 234; *Eppendorf v. Brooklyn City & N. R. Co.*, 69 N. Y. 195; s. c., 25 Am. Rep. 170; *Shear. & Redf. Neg.*, § 282. So, in *Germantown P. Ry. Co. v. Brophy*, 17 Rep. (Penn.) 538, it was held not negligence *per se* for a passenger to rest his arm on a window-sill, "which is substantially the top of the back

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of the seat," whence, by a jolt of the car, his arm was thrown out of the window and injured; the court saying: "In the absence of collision with an external object his arm was in no danger of injury. He was under no legal obligation to assume or anticipate that the company would run another car against the one in which he was sitting." But if instead of resting his arm on the window-sill, he had taken hold of it as did the plaintiff, his hand extending, say, less than an inch beyond the car, the same suggestion might be made (notwithstanding the additional fact) in considering the question of negligence. Whart. Neg., § 362; Hutch. Carr., § 659; Thomp. Carr. 258; *Fordham v. London, etc., Ry. Co.*, L. R., 3 C. P. 368; Ang. Carr., § 559, note; *Seigel v. Eisen*, 41 Cal. 109; *Miller v. St. Louis R. Co.*, 5 Mo. 471; *Spencer v. Mil. & P. R. Co.*, 17 Wis. 487. That is to say, whether the position or conduct of the passenger in such cases is reasonably prudent, considering the circumstances and the probability that the carrier will exercise due care is not necessarily a question for the court (though in clear cases it of course would be), but may be and ordinarily is for the jury.

It must also be considered that in order to the successful operation of cars there must be a reasonable space on each side, between them and any structures or obstacles in the street, to accommodate their movements caused by irregularities or impediments on the track; and that as respects danger from collision with such structures, it is ordinarily easily averted in the case of street cars, which run at a moderate rate of speed, and are readily controlled. *Lynam v. Union Ry. Co.*, 114 Mass. 88; Thomp. Carr. 258, 446. The question of the passenger's negligent conduct must be largely affected by the circumstances of each case, including any indications of danger from obstructions, or interruptions from whatever cause, which might influence the conduct of a prudent person. But in *Todd v. Old Colony & F. R. Co.*, 3 Allen, 18; s. c., 7 Allen, 207, it was unqualifiedly ruled that voluntarily suffering an arm or any part of it by a passenger to extend beyond the external surface of a car was negligence *per se*. And in *Pittsburg & C. R. Co. v. McClurg*, 56 Penn. St. 294, it is assumed by the court that such conduct by a passenger is wholly unauthorized and presumptively negligent. These cases growing out of accidents arising upon steam railways have been followed by the courts of several other States. The same rule was also applied in *Lauderbach v. People's R. Co.*, Penn. Sup. Ct. 1884—a street car case. The hand of a passenger

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holding on to the window of a car was caught by a colliding car on a narrow street, where the cars necessarily grazed in passing. No reference is there made to any supposed distinction between the case of street and steam railroad cars. The court assume that the protruding hand or arm is in an unlawful place if in any degree outside of the car by the voluntary act of the party, thus cutting off discussion as to whether, in the absence of any regulations on the subject, such conduct in a passenger would be condemned as careless by men of ordinary prudence. The opposite doctrine is maintained as to street cars in *Miller v. St. Louis R. Co.*, *supra*; *Seigel v. Eisen*, *supra*. We do not undertake to speak as to the application of the rule to other than street railways, but confining ourselves closely to the facts of this case as presumptively found in plaintiff's favor by the jury, we are of the opinion that the case was properly submitted to them.

Order affirmed.

NOTE BY THE REPORTER.—In *Germantown Passenger Ry. Co. v. Brophy*, Pennsylvania Supreme Court, January 14, 1884, it was held that where a person sits in a street car with his arm resting on a window sill wholly within the car, and by a sudden collision his arm is thrown out and broken, his occupying such a position is not contributory negligence in law. The court said: "The company has two railway tracks, separated by so narrow a space on a curve, that when its cars were passing in different directions they came in collision, whereby the defendant in error, a passenger in one of the cars, was injured. The main contention is whether he was guilty of contributory negligence in producing the injury to his arm. * * * The learned judge charged that if he sat with his arm out of the window when the collision occurred, he was guilty of negligence, and could not recover. Not satisfied with this, the counsel for the company requested the court to charge if the defendant in error placed his arm on the window sill, and by a jolt of the car it was thrown out of the window and he was injured, he was guilty of contributory negligence, and could not recover. The court refused to so charge, but left it to the jury to find whether if he was so riding it was negligence on his part which contributed to the injury. The company has no just cause of complaint of this answer. It would have been clear error if the court had instructed the jury that occupying such a position was negligence in law. Resting his arm upon the window-sill wholly within the car, created no legal presumption of negligence. If it constituted negligence, it was a fact to be found by the jury, to whom it was submitted, and it was not to be so declared by the court. In the absence of a collision with an external object his arm was in no danger of injury. He was under no legal obligation to assume or anticipate that the company would run another car against the one in which he was sitting. The window-sill in a railway car is substantially the top of the

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back of the seat. It cannot be declared negligence in law for a passenger to so rest his arm, and the jury has found it is not negligence in fact."

See *Dun v. Seaboard and R. Co.*, 78 Va. 645; s. c., 49 Am. Rep. 888; *Barton v. St. Louis, etc., R. Co.*, 53 Mo. 258; s. c., 14 Am. Rep. 418, and note, 423; and *Summers v. Crescent City R. Co.*, 84 La. Ann. 139; s. c., 44 Am. Rep. 419; *Memphis, etc., R. Co. v. McCool*, 83 Ind. 292; s. c., 43 Am. Rep. 71, and note, 73; *Pittsburg v. Connellsville*, 17 Am. Rep. 568.

It is culpable negligence in the managers of a railroad if their servants permit a car to stand upon a side track for five or ten minutes before the arrival of a train upon the main track, and to remain there until the arrival of that train in such a position that the incoming train must strike it; and it entails liability upon the company as a common carrier, for accidents happening in consequence. A passenger who rests his elbow on the sill of an open window in a car, but without protruding it beyond the car, and whose arm is thus thrown by the force of a collision outside of the car and is injured in the collision, does not contribute to the cause of the injury by his own negligence. *Parlow v. Kelly*, 108 U. S. 288.

In *Miller v. St. Louis R. Co.*, 5 Mo. App. 471, it was held not to be negligence *per se* to expose the elbow to some extent from the window of a street car drawn by horses on a track laid upon the streets of a city.

OSBORNE V. KNIFE FALLS BOOM CORPORATION.

(28 Minn. 412.)

Constitutional law — boom company.

A company may be authorized to construct and maintain a boom on a navigable river and to collect and control all floating logs within certain limits, and to demand boorage on delivering them to their owners.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

J. M. Gilman, Gordon E. Cole and W. W. Billson, for appellants.

Warner & Stevens and J. N. Castle, for respondents.

BERRY, J. Facts as follows are found by the court which tried this action below: The St. Louis river rises in this State and flows over 200 miles therein, forms the boundary between it and Wis-

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consin for about 20 miles, and then empties into Lake Superior. Upon it and its tributaries and in the region drained thereby lie extensive pine forests, large tracts of which, situate above the obstructions maintained by defendants in the river, as hereinafter stated, are owned by plaintiffs. This river furnishes the only practicable route by which the logs and lumber of these forests can be transported to market. Ever since its acquisition by the United States this river has been a public highway, navigable by steamboats for twenty miles from its mouth and for 200 miles above for row-boats, canoes and bateaux, with the exception of two portages, one from Fond du Lac to Thompson, a distance by river of about nine miles, and the other around Knife Falls. In its natural state the river was of such capacity and character as to render it practicable to float loose logs and timber from near its source to its mouth during periods of ordinary high water, and for this purpose it was a valuable highway. From Thompson to Fond du Lac the river "flows down a series of cascades and rocky rapids, over which, in its natural state, logs and timber would float in a rising state of high water; and though the rapids have been improved for the running of logs by the building of dams and the blasting out of rocks, still to run them successfully logs must be allowed to reach them on a high or rising stage of water, otherwise they will be hung up on the rocks." There are twelve saw-mills at and near Duluth, of large capacity, and the plaintiffs, owning pine lands as aforesaid, desire to float logs cut thereon down the river to said mills for manufacture or sale, and any obstruction to such floating renders the lands and timber of plaintiffs less valuable and inflicts upon them "a special injury not common to the public generally."

By the terms of Sp. Laws 1872, chap. 106, the defendant, the Knife Falls Boom Corporation (under license from which the other defendant, the St. Louis River Boom and Improvement Company, has proceeded), is authorized and required to construct, maintain and keep in reasonable repair such booms in and upon the St. Louis river, within townships 49 and 50 of range 17, in Carlton county (being the township within which are the obstructions complained of in this action), at such points as it may deem advisable and sufficient to secure, receive, scale, and deliver all logs that may, from time to time, come or be driven within said limits, and to receive and take the entire control and possession of all logs and timber which may be run, come or be driven within the same, and boom, scale

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and deliver them as hereafter provided. Section 3 of the chapter provides that all logs and lumber coming within the limits aforesaid, before delivery thereof to the owners, shall be scaled by the surveyor-general; the expense of the scaling, not exceeding two cents per thousand feet, to be paid by said Knife Falls Company. Scale bills of each separate mark are to be made out by the surveyor-general, as logs are required to be delivered, and when so assorted and scaled, secured in strings, brails or otherwise, as the surveyor-general may deem proper, they are to be delivered to the proper owner, upon reasonable request, upon paying to said company the amount of boomage and other charges authorized by the act. By section 4, as amended by Sp. Laws 1878, chap. 73, the company is entitled to compensation for boomage (which includes scaling, assorting and delivery of logs), at a rate not exceeding 45 cents per thousand feet for the first five years, and until the legislature shall alter or change the same, to be computed from the scale bill required to be made by the surveyor-general; and by the same section all logs required by the owners thereof to be turned over the Knife Falls below the boom shall be turned over by said company upon payment by the owners thereof of the above-named compensation per thousand feet, and no additional charge shall be made therefor. By section 5 the compensation to which the company is entitled becomes due whenever the logs are scaled and ready for delivery, and a lien is given to the company upon enough of the same to pay their lawful charges.

Beginning in 1880 the defendants have constructed piers and booms across the entire width of the St. Louis river, within the limits mentioned, by means of which they stop and hold all logs and timber floating down said river to the places where the piers and booms are situated. The defendants have also constructed, in connection with the piers and booms, assorting booms and gaps, to facilitate the assorting of logs so stopped and the delivery of logs destined to mills within said limits to the owners thereof, and the turning of logs destined for points on the river below said limits loose in the river below said works; and such assorting works require all logs passing down the river to pass through an opening about 27 feet wide. The general plan of the assorting works is such as is in quite common use throughout the lumbering regions of the Northwest for like purposes, and no better is suggested. The capacity of the works for the rapid assorting and delivery of

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logs can be largely increased without altering the general plan, and without unreasonable expense, by extending the assorting booms and widening the upper portion of the passageway to 40 feet in width, or by making two passageways, or by both means; but as much or more will always depend upon the proper manning and operating the works as upon their construction and capacity.

It is not practicable to construct and operate any booms or assorting works on the St. Louis river within the limits mentioned, through which any considerable quantity of logs can be passed — and assorted as they pass — without material hindrance and delay to logs destined to points below such limits, and if logs have to be scaled during their passage through the works, the hindrance and delay must be much greater. No boom or other obstruction in the St. Louis, within the limits mentioned, can be of any aid, service, or assistance to the plaintiffs, or others, who desire to run their logs to any point below such limits; but such boom or other obstruction will, under any and all ordinary circumstances, operate as a detriment so far as they delay logs in reaching their destination, and such delay is likely to be serious and considerable, because logs will usually reach such works in high water, which seldom lasts in the St. Louis for more than one to three weeks, and if logs are detained in the booms until a falling stage of water occurs, they will not pass over the rapids until another rise, and a rise does not ordinarily occur more than twice a year. It is not practicable to raft logs on the St. Louis river above the limits mentioned, or to float rafts through the limits, or along the river below the same above Fond du Lac, and there is no opening left in defendants' works for the passage of either rafts or boats, and the booming, scaling, assorting and delivering of logs mentioned in the fourth section of the act aforesaid are of no benefit or advantage to the owners of logs destined to points at or below Fond du Lac. Some of the plaintiffs during 1882 and 1883 cut logs on the St. Louis and its tributaries above defendants' booms, and endeavored to float them to Duluth, but succeeded in getting only a small part through, the detention at defendants' booms and the unusually low water in the St. Louis during these years having "each supplemented the other in delaying said logs."

Within the limits mentioned there are certain rapids, out of which defendants have blasted and removed rock, thereby making a better channel for the passage of logs, but it was entirely feasible

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and practicable to float logs over them in their natural state. The defendants claim the right to charge, and do charge and collect and threaten to charge and collect, by detention and sale of logs, 45 cents per thousand feet for all logs passing their works whether assorted and delivered to their owner, or allowed to pass down the river in a common mass without being assorted and delivered to their several owners; and the plaintiffs and others are deterred thereby, and by the hindrance and delay occasioned by defendants' booms and piers, from cutting and floating to Duluth large quantities of logs, as they otherwise would do.

The special relief demanded by plaintiffs is that defendants be restrained from stopping, hindering or delaying the passage of plaintiff's logs down the river, and that they be required to remove the piers and other structures erected by them in the river, so as to give a free and unobstructed passage to the plaintiffs' logs, or that they be required so to alter their works as to enable them to separate from plaintiffs' logs such as are to stop at Knife Falls, and allow plaintiffs' logs to pass on whenever and while the water in the river is sufficient to take them over the rapids, and before it becomes too low for that purpose, and so as not to delay the plaintiffs in getting their logs to Duluth over said rapids, or to increase the expense thereof.

As a conclusion of law the trial court found that plaintiffs were not entitled to the relief demanded, but that defendants were entitled to judgment against plaintiffs for costs.

While in our view of the law of this case, some portion of the foregoing findings may not be necessary to the proper consideration and determination of the substantial questions involved, we have thought best to present them, in order that it might fully appear what state of facts was before us.

It may be conceded in this case, as it was by Mr. Justice MILLER, speaking for the Federal Supreme Court, in *Pound v. Turk*, 95 U. S. 459, 462, in reference to the Ohippewa river, that the St. Louis is a "navigable river of the United States," and as such protected by our congressional enabling act, and by the Constitution and laws of this State, which make rivers of that character "common highways, and forever free, as well to the inhabitants of said State" (of Minnesota) "as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." But the findings of the trial court show that its navigability in those parts obstructed

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by defendants' works is in fact a navigability, or more properly, a mere floatability, for loose logs only. As respects the navigation of the river, the plaintiffs' only complaint is that their loose logs are detained by defendants' works. The case is then wholly disembarassed of any difficulties which might present themselves if the river was navigable in the ordinary extended sense—that is, for vessels and rafts—and the complaint was of the interruption of that sort of navigation. The practical questions before us relate solely to the rights of the plaintiffs to the use of the river for the purpose of floating loose logs.

Where a stream, as the St. Louis, is of such a character that logs can only be floated in it loose, the logs of different owners will unavoidably become intermingled. This intermingling is inseparable from the use of the stream. The right to float logs in a stream of course implies the right to take them out; and when the logs of different owners, A, B, and C, are thus intermingled, there appears to be no practicable way for A to separate his from B's and C's, in order to take them out, except by stopping the whole mass. If this can not be done, then A's right of floatage is of little or no value. Yet A's right to use the common highway is equal to that of B or C, and if his interest requires that his logs should be taken out at a point above the place where B's or C's interest requires that theirs should be taken out, respectively, he must have a reasonable right to stop the mass for that purpose; a reasonable right—that is to say, a right reasonable as between him and B and C, and others using the river for like purposes. *Watts v. Tittabawassee Boom Co.*, 52 Mich. 203.

Now it appears that there is a large number of persons (there are fourteen plaintiffs in this case) owning standing timber upon the upper waters of the St. Louis and upon its tributaries, who must float their logs to market down the St. Louis, some to Fond du Lac, Duluth, or Superior, and some to Cloquet, or other points above and near Knife River Falls. The interest of the latter requires that their logs should be stopped before passing Knife River Falls; the interest of the former, that their logs should be allowed to run over them without interruption. In this conflict who is to determine how the right of floatage upon this common highway shall be enjoyed? Who is to fix upon the just and proper compromise of these conflicting interests? Obviously, the legislature—that department of government, which in the exercise of a law-making and

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a police power, prescribes the rule by which the use of public highways in general is regulated (*Pound v. Turck, supra*; *Watts v. Tittabawassee Boom Co., supra*); and save as controlled by paramount law — that is to say, in this instance, by our State Constitution or enabling act — the discretion of the legislature in the premises is practically unlimited. It may enact laws prescribing the manner in which the common right of floatage shall be enjoyed. It may determine what means shall be adopted, and by what agency, to secure results, which in its judgment are the best and fairest practical compromises of conflicting interests — the best attainable good of all concerned. *Pound v. Turck, supra*; *Duluth Lumber Co. v. St. Louis Boom Co.*, 17 Fed. Rep. 419. In the exercise of its legislative discretion, it may authorize suitable means and instrumentalities to secure this end to be provided and employed by a private person or by a corporation, and it may prescribe what these means and instrumentalities may be — as booms, dams, piers, sluiceways — and what use may be made of them, and in general, in what manner the business shall be conducted. *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; *Benjamin v. Manistee River Imp. Co.*, 42 Mich. 628; *Wisconsin River Imp. Co. v. Manson*, 43 Wis. 255; s. c., 28 Am. Rep. 543.

But it is contended that the legislature is prohibited by our enabling act and State Constitution from interfering or authorizing interference with the free and unobstructed navigation of the St. Louis river. Conceding, as we have, that the enabling act and the Constitution are applicable to the St. Louis river, they provide in substance that it shall be a "common highway, and forever free,

* * * without any tax, duty, impost, or toll therefore." Keeping constantly in mind the capital fact that the present controversy relates solely to the floating of loose logs, the only kind of navigation of which the stream is susceptible,) let us see what the legislature has attempted to do; premising, at the outset, that the presumption in favor of the validity of legislation requires us to assume that if the legislature had the power to pass the special act under which defendants justify, the state of facts before it was such as to warrant its particular provisions. Referring to our previous abstract, and to the act itself, for details, it is enough to say here that those parts of the act which concern the present controversy, in their general scope and effect, authorize and require the Knife Falls Boom Corporation to provide

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booms within specified limits, including Knife Falls, to receive and take the entire control of all logs and timber coming within the limits, and to boom, scale and deliver them to the proper owners, upon reasonable request — those required to be delivered above Knife Falls to be delivered in strings, brails or otherwise, as directed by the surveyor-general, and those required to be turned over Knife Falls to be so turned over; such turning over being as to them the only delivery required. Of the provisions as to boomage we will speak hereafter.

Now the effect of all this is to constitute the Knife Falls Boom Company a public agent, a *quasi* public corporation (like a railway company), a representative of the State charged with the functions of (so to speak) administering the navigation or floatage of the St. Louis river within certain limits, and of controlling and directing the use of the river for the common advantage, and with reference to the common necessity of those concerned in floating logs thereon. *Cohn v. Wausau Boom Co.*, 47 Wis. 314. Notwithstanding this control the river remains a common highway; any person who desires can float his logs in it. If the enabling act and our Constitution use the words "forever free as well to the inhabitants of said State as to all other citizens of the United States" as meaning that such inhabitants and citizens cannot be deprived of the use of the river (which would appear to be about the same as making it a common highway), the act under consideration does not deprive them of such use of the river, or exclude them from the common highway, or attempt to do so. What is done is not to deprive them of the use but to regulate the use of the same for the common benefit. The act does not assume to declare that any person shall not use the river, but regulates the manner of use according to what the legislature in its discretion has regarded as the necessity of the case. The legislature is to be credited with the presumption that this will, on the whole, facilitate the use of the river, and in a just as well as authorized sense improve it for the purpose of floating logs.

The provision allowing boomage charges is not an infringement of that portion of the Enabling Act and our State Constitution which declares that the river shall be forever free, * * * without any tax, duty, impost or toll therefor." Taking the words "forever free," and the words "without any tax, duty, impost or toll therefor," to be equivalent, then the act does not disregard the Enabling Act or our Constitution. The boomage is not charged for the use of

river, but to compensate the defendants for their outlay in erecting and maintaining the works which the legislature has deemed proper to facilitate the common use of the stream, and which it has therefore authorized, as also to compensate them for such care and control as it is their duty to exercise over the logs coming within their chartered limits. The defendants' works are improvements of and aids to the navigation of the river, viz., its use for floating loose logs. This doctrine is held in *Cotton v. Miss. & Rum River Boom Co.*, 22 Minn. 372; *Weaver v. Miss. & Rum River Boom Co.*, 28 Minn. 534; *Stevens Point Boom Co. v. Reilly*, *supra*; *Cohn v. Wausau Boom Co.*, *supra*; *Watts v. Tillabawassee Boom Co.*, *supra*; *Duluth Lumber Co. v. St. Louis Boom Co.*, *supra*; *Pound v. Turck*, *supra*; *Black River Imp. Co. v. La Crosse B. & T. Co.*, 54 Wis. 659; s. c., 41 Am. Rep. 66; and the doctrine that tolls may be charged on account of such improvements without infringing upon the freedom of the river is upheld in *Benjamin v. Manistee River Imp. Co.*, *supra*; *Duluth Lumber Co. v. St. Louis Boom Co.*, *supra*; *Nelson v. Cheboygan Slack-Water Nav. Co.*, 44 Mich. 7; s. c., 38 Am. Rep. 222; *Manistee River Imp. Co. v. Sands*, 19 N. W. Rep. (Mich.) 199; Cooley Const. Lim. *592; Gould Waters, § 143.

The plaintiffs contend that they should not be compelled to pay boomage, because they derive no benefit from defendants' works; that as to them such works are not improvements facilitating the use of the river. And the trial court finds that no boom or booms or other obstructions in the St. Louis, within the limits mentioned in the act, can be of any aid, service or assistance to the plaintiffs, or others who desire to run their logs to any point below such limits; but will, under any and all ordinary circumstances, operate as a detriment by delaying their logs. It may be true that if the plaintiffs could have the exclusive use of the river, their logs would reach them with less delay than the defendants' works will permit. In such circumstances it would be true that the works would be of no advantage to plaintiffs, but the contrary. But the river is a common highway, and the plaintiffs are not entitled to its exclusive use. It can only be used for floating loose logs. That is the way in which plaintiffs use and propose to use it. The result is that their logs are necessarily intermingled with those of other persons desiring to avail themselves of the common highway. As respects the right to use the river, the parties stand on the same footing. Unless the mass of intermingled logs can be stopped at the proper

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place, so as to enable those whose interest demands it to separate their logs from the mass, they are virtually deprived of the use of the river, and in fact none can use it to advantage except those whose logs are to be run to the end of the river. On the other hand, it is for the plaintiffs' interest that their logs should run on without stoppage or delay. In this conflict of interest the defendants' works are intended by the legislature to render practicable the enjoyment of the common right of navigation; to reconcile, as far as may be, the exercise of somewhat inconsistent rights to the use of the river; in a word, to enable all to float their logs loose and intermingled, as they must do, and at the same time preserve and secure the reasonable rights of all.

On the whole, this is an improvement of the river for the benefit of all concerned in its use, and one for which it is therefore competent for the legislature to require those using the river to make compensation. The fact that in a particular instance the works may be of no advantage to a particular person, or that he would be better off without them, does not affect this general proposition. If a lock, by which slack-water navigation of a public river is secured so that it can be ascended with greater facility, is of no advantage to one simply desiring to descend the river, it would not be contended that it was improper or incompetent to require such person to pay for using the lock which had been authorized and constructed for the general benefit — the advantage of the public on the whole. This illustration, as well as that drawn from the operation of the pilot laws by Mr. Justice MILLER in *Duluth Lumber Co. v. St. Louis Boom Co.*, *supra*, is in point in the case which might be presented, if, at a given time, no logs were running in the St. Louis except such as were destined to points below defendants' works. Notwithstanding a particular instance might present this state of facts, yet in accordance with what the legislature, in its wisdom, has deemed to be the general good, the defendants' works must be maintained, and the defendants must be prepared to perform the duties enjoined upon them, and for the expense of doing these things it is competent for the legislature to provide that they shall be reimbursed.

It is perhaps possible that there might be legislation (similar to that involved in this case) so outrageously and palpably extreme as to justify a court in pronouncing it in excess of legislative authority; but this state of things is not to be presumed; and though the act under consideration may be imperfect and susceptible of improve-

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ment, we discover in it no evidence of such excess of legislative authority.

From what we have said it follows that in our opinion the special act under which the defendants justify is valid, and that it authorizes defendants to take charge and control of plaintiffs' logs, and to charge boomage accordingly. Very similar legislation appears to have been had in other instances in this State, and in Michigan and Wisconsin, where it has borne the test of judicial investigation.

[Omitting minor questions.]

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PULLMAN PALACE CAR COMPANY V. BLUHM.

(109 Ill. 20.)

Negligence — proximate cause — negligence of surgeons.

Where one has been injured by the negligence of another, and uses ordinary care in endeavoring to be healed, and in selecting and employing nurses and surgeons, but owing to the negligence or unskillfulness of the latter the injury is increased, the party causing the original injury will also be responsible for the latter. (*See note, p. 608.*)

ACTION for personal injury by negligence. The head-note states the point. The plaintiff had judgment below.

Isham, Lincoln, Burry & Ryerson, for appellant.

John Lyle King, for appellee.

DICKEY, J. We cannot inquire into or consider the proposition of counsel for appellant, that as he says "the only causes of the injury were the carelessness of appellee and that of his fellow-servants." What was the cause of the injury, or the combination of causes producing the result, is a question of fact, which, by law, it is not the duty of this court to consider. So, also, is the question as to whether the damages are or are not excessive.

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It is insisted that the court erred in permitting plaintiff to prove, in enhancement of his damages, that his arm, which was broken between the shoulder and elbow, was not cured, and that the parts of the bone, instead of uniting in one, had failed to unite, and formed what is called a "false joint." Appellant insists that this last was the result of bad surgery, and to be proven, should have been set out as special damages, not being as he suggests, such damages as ordinarily arise from a broken arm. We think the declaration is sufficiently specific to admit the proof. Whether this particular ailment (the false joint) was, or was not, the result of the breaking of the arm as a proximate cause, or the result of a new, independent factor, for which appellant was not responsible, could not be determined by the court as a question of law. It could be properly tested only by hearing the evidence and submitting the questions of fact to a jury, under appropriate instructions.

There is evidence tending to show that had this broken arm received ordinary care and ordinary professional skill, the parts would have united with little or no permanent injury, and on this hypothesis alone appellant insists that the matter of this false joint should have been, at least hypothetically, excluded from the jury. We understand the law on the subject to be, that plaintiff cannot hold defendant answerable for any injury caused, even in part, by the fault of plaintiff in failing to use ordinary care or ordinary judgment, or for any injury not resulting from the fault of defendant, but caused by some new intervening cause not incident to the injury caused by defendant's wrong. Thus in this case, if it be conceded that the false joint, under proper care and skill, would not have resulted from the breaking of the arm alone, but was brought about by the subsequent separation of the parts after they had been properly set, and before nature had formed a firm union, then if this subsequent separation of the parts had been caused by an assault and battery by a stranger, or some foreign cause with which appellant had no connection, and which was not in its nature incident to a broken arm, plainly appellant ought not to be held to answer for the false joint; but if appellee exercised ordinary care to keep the parts together, and used ordinary care in the selection of surgeons and doctors and nurses, if needed, and employed those of ordinary skill and care in their profession, and still by some unskillful or negligent act of such nurses, or doctors or surgeons, the parts became separated, and the false joint was the result, appellant, if re-

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sponsible for the breaking of the arm, ought to answer for the injury in the false joint. The appellee, when injured, was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such surgeons and nurses as ordinary prudence in his situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession. But the law does not make him an insurer in such case that such surgeons or doctors or nurses will be guilty of no negligence, error in judgment, or want of care. The liability to mistakes in curing is incident to a broken arm, and where such mistakes occur (the injured party using ordinary care), the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm.

Without discussing each ruling of the court in the matter of instructions, it is sufficient to say that such rulings were at least as favorable to the appellant as the law would permit, and in some respects more so.

Finding no error in law in the record of the proceedings in the Circuit Court, the judgment of the Appellate Court is hereby affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Schmidt v. Mitchell*, 84 Ill. 195; s. c., 25 Am. Rep. 446; *Sauter v. New York, etc., R. Co.*, 61 N. Y. 50; s. c., 23 Am. Rep. 18, and note, 22.

In *Loeser v. Humphrey*, 41 Ohio St., L. & Co. carelessly and negligently left their horse, which was harnessed and hitched to their wagon, standing in a public street without being properly tied or guarded. The horse ran away, and the wagon violently collided with a wagon of H., in which he was sitting, whereby he received severe bodily injury. At the time of his injury H. was free from contributory negligence. Immediately after his injury he employed a physician "of good standing and reputation," placed himself under his treatment, and followed his directions. *Held*, that although the physician may have omitted to apply the remedy most approved in similar cases, and by reason thereof the damages of H. may not have been diminished as much as they otherwise would have been, he may still recover of L. & Co. for his actual damage. It seems to be well settled, that where one is injured by the negligence of another, if his damage has not been increased by his own subsequent want of ordinary care, he will be entitled to recover of the wrong-doer to the full extent of the damage, although the physician whom he employed omitted to apply the remedy most approved in similar cases, and by reason thereof the damage of the injured party was not diminished as much as it otherwise

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would have been. *Lyons v. Erie R. Co.*, 57 N. Y. 489; *Tuttle v. Farmington*, 58 N. H. 18; *Storer v. Bluchill*, 51 Me. 439; *Bardwell v. Jamaica*, 15 Vt. 493; *Collins v. Council Bluffs*, 33 Iowa, 324; s. c., 7 Am. Rep. 200; *Rice v. Des Moines*, 40 Iowa, 638; *Eastman v. Sandborn*, 3 Allen, 594; *Page v. Bucksport*, 64 Me. 51; s. c., 17 Am. Rep. 239.

In *Lyons v. Erie R. Co.*, 57 N. Y. 489, it was held in an action to recover damages for injuries alleged to have been sustained by defendant's negligence, where defendant had given evidence tending to show the exercise taken by plaintiff might have tended to retard recovery, and that quiet would have been better, that evidence that plaintiff was advised by his physician that it was right and beneficial to exercise, was proper. The court said:

"He is bound to use ordinary care to cure and restore himself. He cannot recklessly enhance his injury and charge it to another. If his arm be broken he cannot omit to have it set, and charge the loss of the arm to the wrong-doer. He is not obliged to employ the most skillful surgeon that can be found, or resort to the greatest expense to ward off the consequence of an injury which another has inflicted upon him. He is bound to act in good faith and to resort to such means and adopt such methods reasonably within his reach as will make his damage as small as he can. But suppose he makes a mistake and innocently eats or exercises so as to retard his cure or impair his chances of recovery; or suppose he employs a physician who makes a mistake in his treatment, so that he is not as well or as soon restored as he otherwise would have been; who is to be responsible for the mistake? Can the wrong-doer, who has placed him in the position where he must take the choice of remedies and doctors, take advantage of such mistake? Can he shield himself from all the consequences of his wrong because the injured man has not adopted the best means and employed the best doctors? I think not. A wrong-doer breaks an arm; the injury is then done, and the arm for the time is destroyed. He cannot complain that the injured person has failed to restore it so long as he has acted in good faith in its treatment, using the ordinary means within his reach.

"In this case the plaintiff, acting in good faith, consulted a competent physician, who advised him to take exercise. Even if this advice was mistaken, it shielded him against the charge that he recklessly, willfully or carelessly exposed his health or retarded his recovery. To illustrate further, suppose a competent physician had rightfully advised him that he must get out and take exercise, and he had persistently and willfully remained in his house, and had thus aggravated his injuries and postponed or retarded his recovery, could not the defendant have properly shown these facts, as bearing upon the extent of its liability? We must therefore hold that the advice given was competent, not to cast upon the defendant any damage which it did not occasion, but to show that the plaintiff acted in good faith and used proper care to mitigate the damage which the defendant did occasion. 1 Greenl. Ev., § 101."

In *Rice v. City of Des Moines*, 40 Iowa, 638, the court said: "The defendant asked the court to give the following instruction: 'And if you find from the evidence that under proper medical treatment the injury would have

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been limited, then such limited injury would be the measure of defendant's liability. And if you find that the present condition of the plaintiff's injury is occasioned by a failure upon the part of the surgeon to replace any of the bones of the limb, and the want of proper bandages or splints applied to the limb at the time of the injury, and afterward in the treatment thereof; then the defendant is not liable for such neglect, or want of skill in the treatment of such injury, and the plaintiff's damage cannot be measured by the result of such injury as now found to have arisen under such neglect, or want of proper treatment.' The court refused this instruction and gave the following: 'That if the plaintiff was injured, as alleged, it was incumbent on him to make use of reasonable means to effect as speedy and complete a recovery as could reasonably be accomplished. That if in the selection of a physician or surgeon, he immediately employed a person of good reputation and skill, and used reasonable judgment in the selection of a skillful surgeon and physician, that his damages should not be affected if he did not secure the most skillful. The plaintiff was bound only to employ a person of such reputed skill, and reputation as persons of reasonable care and prudence were accustomed to employ in such cases.' There is no error in this action of the court. The principle of the instruction given was approved by this court in *Collins v. City of Council Bluffs*, 32 Iowa, 324; s. c., 7 Am. Rep. 200; see, also, *Lawrence v. Housatonic Ry. Co.*, 29 Conn. 390; *Stover v. Bluehill*, 51 Me. 439. COLE, J., dissented in *Collins v. City of Council Bluffs*, and now dissents as to this point." The rule as to the degree of care required of the plaintiff is not changed by the fact that he was himself a physician and surgeon. *Boyn-ton v. Somersworth*, 58 N. H. 321.

PEORIA AND PEKIN UNION RAILWAY COMPANY v. CHICAGO,
ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

(109 Ill. 135.)

Carrier — railroad company transporting cars of another railroad company.

A railway company is bound to receive the freight cars of other railway companies for transportation, and is subject to the liability of a common carrier in respect to them.

ACTION for value of a freight car destroyed by fire. The opinion states the case. The plaintiff had judgment below.

Stevens, Lee & Horton, for appellant.

J. C. Hutchings, Thomas F. Withrow and H. W. Wells, for appellee.

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SCOTT, J. The defendant in this case is a railroad corporation existing under the laws of this State. By the Constitution of the State (§ 12, art 11), all railways are "declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." It is conceded defendant is a common carrier of freights for hire, and as such is bound to carry safely all freights tendered, with the usual and customary fares, or answer in damages for its miscarriage or refusal. Section 10, article 11, of the Constitution provides, "the rolling stock and all other movable property belonging to any railroad company or corporation in this State shall be considered personal property." It must also be conceded a common carrier of freights would be compelled to receive and carry this class of property for the usual fares, as well as other personal property. When the facts of this case shall be stated, it will be seen these constitutional provisions have an important bearing on the decision to be rendered.

It appears from the evidence, defendant's principal business is switching cars for other railroad companies having their terminal points at Peoria, together with some work of that class on its own account. Its tracks are situated in the lower part of the city, and thence connecting by lines of track with mills, elevators and manufactories in and about the city. Other companies desiring to have cars switched by defendant would place such cars on its transfer switch, and defendant would transfer them to the consignees whose places of business were on its tracks, as they should be ordered to do by the company placing them there. When such cars were unloaded by the consignees, it was the duty of defendant to return them to the company from which it received them. Most generally such cars were returned empty. There is evidence however that tends to show it was the common understanding among the companies doing business at this point, if other shippers desired cars, defendant, without any specific order to that effect, was at liberty to place them at their places of business to be loaded, and when loaded they would be returned to the company owning such cars, to be shipped. At all events it appears cars were so handled, and the companies concerned seem to have acquiesced in that mode of doing business. On the 25th day of October, 1881, a car belonging to plaintiff was brought to the city of Peoria loaded by the Peoria and Rock Island railroad — a railroad operated by plaintiff — and

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was placed on the transfer track, and the agent who acted for the Rock Island roads ordered it to be switched to the Monarch mills, or distillery. On the 27th day of that month it was taken by defendant to the distillery, where it was unloaded by the consignees, and on the same day it was taken by defendant from the distillery to the Peoria sugar refinery, on an order from the refinery, to be loaded and then switched to the transfer track for shipment by the Chicago, Rock Island and Pacific Railway Company. In the afternoon of the same day the refinery was burned, and also this car, which was standing in close proximity. There was no order from plaintiff to take this car to the sugar refinery for any purpose, and it is not shown it had any knowledge defendant intended to do so.

The propositions of law certified by the Appellate Court, when resolved, involve the single inquiry whether defendant in the transaction out of which this action arose bore to plaintiff the relation of a common carrier, or was it that of a bailee, or that of a warehouseman. When the true relation of the parties shall be ascertained, the law fixes the extent of defendant's liability, if any exists. Unless it shall be found defendant was a common carrier as to this car, no liability would rest upon it for the loss, as no negligence is imputed to defendant.

The question presented is one of first impression in this court. Nor have counsel cited any case where the exact question involved has been considered by any court of last resort. It leaves this court free to determine the law on principle, as shall be thought to best subserve public interests as well as the private interests of corporations concerned. No proof is needed to show the extent and the importance of the interests involved in the decision. It is a matter of so much public concern, that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage it would be difficult, if indeed it would be possible, to transact the commercial business of the country. Freights for shipment across the continent could not well be stopped at the terminus of each carrier's line, and re-shipped in cars of the connecting carrier. That would occasion more delay than the necessities of commerce would tolerate. The extent of the usage in regard to the exchange and transportation of cars among so many different railroads

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would seem to require such exacting rules and regulations as would insure the strictest accountability on the part of companies that may transfer or haul cars over their respective roads.

The statute of this State that forbids "extortion and unjust discrimination" by railroad companies, would seem by its provisions to recognize that railroad corporations may be common carriers of "cars," as well as of freights, for such a corporation is not only forbidden to make any unjust discrimination in its charges for the transportation of passengers or freights, of any description, but for the use and "transportation of any railroad car" upon its road. And why may there not be such a thing as a common carrier of cars, either with or without its load of freight? As to the freight the car contains, it will be conceded such carrying roads are common carriers, and are subject to the strict liability of such carriers, and as has been seen by a constitutional provision all the rolling stock and other movable property belonging to a railroad corporation in this State shall be considered personal property. What reason exists for discriminating against this class of "personal property," and for holding that railway companies carrying it shall not be regarded as common carriers? The mode of moving it, whether on wheels or in carriages, ought not to be the foundation for any distinction. In either case the property is in the exclusive care and control of the carrier, and there is as much reason arising from public considerations why such a carrier should be held to the strict liability of an insurer for the safety of the property, in the one case as in the other. The facts in the present case show a strong necessity for imposing the liability attaching to a common carrier. The car in question was delivered to defendant, to be carried over its road to the warehouse of the consignees of the freight it contained. A charge for the service to be rendered was made, and was paid by the consignees. The undertaking was also to return the car to the company from which it had been received, and the charges collected, or to be paid, included the latter service. Thus it is seen defendant had the exclusive control of the car while on its tracks while in course of transportation to the consignees, and that control would seem to be as absolute as over any package of freight it might have to carry or otherwise deliver. Plaintiff had parted with the care and custody of the car, and could not at any point on defendant's road interfere for its safety. Its care was intrusted to defendant as

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fully as was freight it contained. The undertaking of defendant in regard to moving the car was within the scope of the general business it had engaged to do for the public, and it would seem no reason exists why the liability for the safe delivery of the car should not be the same as to the freight it contains, which it is conceded is that of a common carrier. On what principle may defendant be considered a common carrier as to freights on its road and not as to the car containing it, which it is moving over its road with its own propelling power?

The law, as has been seen, makes all railways in this State "public highways," open to the use of all persons for the transportation of their persons or property, under such regulations as may be prescribed by law, and it is apprehended it is unlawful to make any discrimination as to the property offered to be carried, or as to whether it belongs to a private person or to a corporation. If it is such property as is capable of being carried with the means ordinarily employed by such carriers, the obligation is imperative, and the carrier must receive the property and carry it with safety, in the way such property is usually carried, and any failure to do so will subject the carrier to damages.

The only case to which the attention of the court has been directed having any features like the one being considered, is *Mal-lory v. Tioga R. Co.*, 39 Barb. 488. In that case the defendant company, which it is conceded was a common carrier as to freights and passengers, engaged to furnish plaintiff the motive power to draw his cars, loaded with his property, over its road, the plaintiff being obligated to load and unload his cars, and furnish brakemen to accompany them, but who were subject to the control of defendant's conductor, and it was held defendant assumed the liability of a common carrier, and consequently was liable for injuries to plaintiff's cars and property not caused by inevitable accident or to the public enemies.

But aside from authority, the conclusion reached on principle is, defendant occupied the relation of a common carrier as to the car of plaintiff in its possession, as well as the freight it contained, and as such was liable for its safe return to plaintiff, unless its loss occurred from causes which exempt common carriers, which is not claimed in this case.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

HAWTHORN V. PEOPLE.

(109 Ill. 302.)

Constitutional law — regulation of trade.

A law requiring operators of butter and cheese factories on the co-operative plan to give bonds for faithful accounting for property received for manufacture is not unconstitutional.

INFORMATION. The opinion states the case.

Charles Wheaton and R. N. Botsford, for appellants.

James McCartney, attorney-general, *Hiram H. Cody* and *T. E. Ryan*, for people.

WALKER, J. The prosecuting attorney of Kane county, at the June term, on the 12th day of July, 1883, filed in the County Court of that county an information against appellants, for failing to file the bond required by the act of the 18th of June, 1883. (See Sess. Laws, p. 54.) It is not disputed that appellants were operating a butter and cheese factory in that county. It appears they received the milk of the farmers of the neighborhood, manufactured from it butter and cheese, for which they retained four cents a pound for butter, and two cents a pound for cheese, after selling it, and the balance was to be divided among those who furnished the milk, as we suppose, to each in proportion to the amount furnished and manufactured. Appellants sold in market all the butter and cheese they manufactured, and divided the proceeds as stated. It is admitted they did not give the required bond, and that appellants continued to operate their factory in the same manner after as before the time elapsed for the statute to become operative. On the trial in the court below, defendants asked the court to hold as a legal proposition that the law was passed in violation of the State Constitution, but the court refused to so hold, and found the defendants guilty, and after overruling a motion for a new trial and in arrest of judgment, rendered a judgment for a fine of \$200, and defendants appeal to this court, and urge a reversal.

The questions argued by counsel are : First, whether or not the general assembly did transcend its constitutional power in enact-

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ing the law; and second, if it did not, whether under the Constitution the title of the act is sufficient to sustain the law. These are the legal propositions arising on the record, and presented for decision.

There can be no doubt that the State legislature possesses supreme power except so far as it is limited by the Constitution or foundation of government, or such power has been delegated to the general government, or its exercise has been limited by the Federal Constitution. A government, as such, cannot exist without the governing or sovereign power adequate to the protection of the people from wrong and oppression. This supreme or sovereign power to enact laws has been confided to the representatives of the people composing the general assembly, and had there been no restrictions or limitations on the exercise of the legislative power, the people, through their representatives, would have been uncontrolled in the exercise of the legislative function. But for such limitations the legislature would have been supreme in the exercise of legislative power, as much so as the ruler in any kind of government. The sovereign or governing power of all governments is the same in character, but in liberal governments the exercise of a portion of the governing power is restrained to secure rights and privileges to the governed. These restrictions and limitations on the different branches in our system of government are alone found in our Constitutions of government. The first section of article 4 of our Constitution provides, that "the legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people." Had there been no restriction by other portions of that instrument, and no previous delegation of the legislative power to the general government, or any limitation of the power by the Constitution, this delegation of the legislative power to our general assembly would have been plenary and without restraint, except its own will and sense of duty. But to restrain such power and to secure the citizen in the enjoyment of such rights as are conceded to him, or he has been left in possession of by government, these limitations and restrictions are imposed by fundamental law.

It is said by Lord Coke : "The power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined, either for persons or causes, within any bounds; and of this high court it may be said : '*Si antiquitatem species, est vetustissima ; si*

dignitatem est honoratissima ; si jurisdictionem est capacissima. It hath sovereign and uncontrolled authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal, this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the Constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. * * * It can change and create afresh even the Constitution of the kingdom and of Parliaments themselves. * * * It can in short do every thing that is not naturally impossible ; and therefore some have not scrupled to call its power (by a figure rather too bold) the omnipotence of Parliament. True it is that what Parliament doth no authority upon earth can undo." 4 Inst. 36 ; Cooley Const. Lim. (1st ed.) 85.

Under our institutions this sovereignty or transcendent power of government resides in or with the people, and may be exercised in the manner they have provided by the Constitution. The people can make and unmake Constitutions. They can, within constitutional restrictions imposed by the Federal Constitution, delegate the powers of government to whom and as they please. They can withhold or intrust it with such limitations as they choose. They, in our State governments, have delegated the power to different departments and have virtually withheld the exercise of the legislative power to themselves, inasmuch as, through their representatives, elected at short intervals, they carry into effect their will, formulated into laws, to be enforced by the other departments. Government would be but a rope of sand, that did not possess sovereignty, with its attributes and incidents — and that indispensable sovereignty must rest in a body large or small to have any efficiency whatever. The founders of our system of government in their wisdom intrusted that transcendent sovereign power to the people, to be exercised by them through their representatives, under the limitations or restrictions of our Constitutions of government. Judge Cooley says (Const. Lim. 85), that in considering the legislative powers of our States it is natural that we should recur to those possessed by the British Parliament, upon which in part our legislatures have been modeled and from which we derive our leg-

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islative usages and customs, or parliamentary common law, and the precedents upon which legislative power is based. He also says it is natural that we should incline to measure such power in this country by the power of a like department in Great Britain ; but we should not be misled, because we must bear in mind that in Parliament rests the sovereignty of the country and it may therefore exercise all governing power, while complete sovereignty is not vested in ours because they are hedged about with limitations, imposed in express terms or by implication.

Where a law therefore is found on the statute books, the presumption is that it conforms to the Constitution. This presumption arises from the fact that each member of both houses who pass the law, and the chief executive who has approved it, are under the same obligation to support the Constitution as are the courts. Having performed all acts necessary to the adoption of the law, we must presume they acted in view of the Constitution and all of its limitations. For these reasons the courts never interfere to declare a law unconstitutional in case of doubt. To authorize such action by the court, it must be clear the law violates some provision of the organic law. When therefore a law is challenged as unconstitutional, we must be able to turn to the provision of the instrument which prohibits the legislature from its enactment, and the repugnancy must clearly appear. These doctrines and constitutional principles are distinctly announced by this court in the cases of *Field v. People*, 2 Scam. 79 ; *People v. Salomon*, 51 Ill. 49 ; *People v. Marshall*, 1 Gilm. 672 ; *Lane v. Dorman*, 3 Scam. 238 ; *Bruce v. Schuyler*, 4 Gilm. 291 ; *Manson v. Wail*, 4 Scam. 127, and *People v. Reynolds*, 5 Gilm. 1, and coincide with the decisions of almost if not all courts.

Then in this case, what provision of our Constitution has been violated ? No provision has been pointed out, except section 6, article 2, of our Bill of Rights. It provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall be inviolate." This law in no sense invades any of those rights. It does not require the seizure of any person or his property, nor does it require the invasion of any one's house, nor does it require a search of his papers, reasonable or unreasonable. We are therefore unable to see that this law in anywise violates that provision. It is true the act does require the manufacturer, at the end of each month, "to

make, acknowledge, subscribe and swear to a report, in writing, showing the amount of products manufactured, the amount sold, the prices received therefor, and the dividends earned and declared for the third month preceding the month in which the report is made," and to file a copy of the same with the clerk of the town or precinct in which the factory is located. This, in terms, falls far short of a conflict, in terms, with that constitutional provision, nor does it conflict in spirit. Here the manufacturer receives the property of a portion of the community to manufacture, sell, and return to them the amount received, over and above his charges for manufacturing the material into the article prepared for the market. This provision is clearly intended to protect the persons intrusting their property to the manufacturer, from wrong and fraud. This is not an unusual exercise of power. It has always been required that executors and administrators intrusted with the property of estates shall file in a public office a full and complete account of their actions with reference to the property thus intrusted to their management and control. This law only requires the manufacturer to render an account of his management of other people's property. He holds himself out as a factor for the management and sale of other people's property, and in that respect is like a public warehouseman.

It is also objected that the legislature had no power to require the manufacturer to give the bond required to enable the manufacturer to commence or continue business, in this mode, in an innocent and lawful business. The business of selling liquor by saloon-keepers is lawful, unless prohibited by law, and all persons might carry on the traffic; but the law has imposed as a condition that all persons shall execute a bond that they will not violate the law, before engaging in that traffic, and such a bond is intended as a security for damages he may inflict on persons injured by violating the law. The bond in this case is intended to secure those who intrust their property to the keeping of the manufacturer, against fraud or misappropriation by him of their property, just as the executor or administrator is required to give bond to secure those entitled to the funds of the estate, or the saloon-keeper to give security that he will not violate the law, and thus inflict injury on his customers.

It is urged that this is an unheard of species of legislation—that the past has furnished no precedent for the law. If this should be

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conceded to be true, that would not of itself render the law unconstitutional. Government was organized, and is supported, to afford protection to the governed against wrong and oppression, and in its organization ample power was conferred on the legislative branch to afford such protection. That branch of the government holds so to speak, a vast reservoir of legislative power never yet exercised, because the exigencies have not arisen requiring it to be exerted; but with our wonderful increase of population, advancing civilization, and increase and complication of business, that reserved power will certainly be called into action. The Constitution has not limited the exercise of legislative power to such enactments as have hitherto been passed. To so hold would be to embarrass good government, and would prove highly injurious, if not destructive.

But it is insisted that it restrains and embarrasses business. If that were conceded to be true, what provision of the Constitution forbids the legislature from exercising the power? We are aware of none. Most, if not all, of the States in the Union have required that persons in almost every species of business should procure and pay for a license to enable them to pursue the calling. Nor so far as we are aware, has the constitutionality of such laws ever been questioned. They were undeniably a regulation, if not a restraint on trade, and yet the power was clearly legislative, and properly exercised. It may be said that was a revenue measure. Admit it, and where is the distinction between the exercise of legislative power to raise revenue, and to protect the people from wrong, oppression and fraud? That body is fully empowered and charged with the duty of performing both acts. Nor are the courts invested with a particle of power to review or control the acts of that body, so long as it keeps within the limits of its constitutional powers. With the wisdom of its acts the courts have no concern, so long as it does not transcend its powers. Where an act of the legislature is challenged in the courts as unconstitutional, all the court can rightly do is to determine whether that body had the power to pass the enactment, and if found to be within the scope of its power, they cannot interfere. To do so would violate the third article of the Constitution, which divides the powers of government, and prohibits each branch from exercising the powers of either of the others. It has been held that the legislature has the constitutional power to control the acts of the governed, even as to the time and the manner of performing labor, by requiring all persons to refrain from labor

or business on Sunday, and the manner in which individuals shall use their property, to prevent injury to others; and such power, so far as we are informed, has seldom been challenged, and always sustained.

A number of cases arising under city ordinances have been referred to by counsel as conclusive that this law is unconstitutional. In none of the cases referred to had the general assembly, in express terms, granted to the municipality the powers that were exercised. Such was the case in *City of Clinton v. Phillips*, 58 Ill. 102; s. c., 11 Am. Rep. 52. There the city authorized the sale of the liquor, but made it penal to fail to make a statement, at designated times, of sales, their purposes, the time, and the persons to whom sold. The case of *Toledo, Wabash & Western R. Co. v. City of Jacksonville*, 77 Ill. 39; s. c., 16 Am. Rep. 611, was a city ordinance requiring the useless act of the railroad company keeping a flagman at a crossing where there was no danger to persons. They are unlike this case. In none of the cases referred to was the law intended to protect the public from wrong and fraud, but the charters of those cities only conferred the power to adopt reasonable ordinances, and it was held they were not such, and were held inoperative for that reason. Nor had the legislature required that such ordinances should be adopted. The corporate bodies, in those cases, were only empowered to pass reasonable ordinances, and they were, in those cases, held to be unreasonable, and therefore void.

It is said that this is not a police regulation. That may be true, if the term were confined merely to the protection of the health and morals of the people. The term has a much more comprehensive meaning. It has been defined to be: "The regulation and government of a country or city, so far as it regards its inhabitants." Also, "the laws, ordinances and other measures which require the citizens to exercise their rights in a particular form." It is true there are other and more limited meanings of the word, and when it is said that there are other limits to its exercise than the Constitution, it has reference to the more restricted meaning of the term. When exercised by the legislature, in its more comprehensive sense, in the passage of laws for the protection of life, liberty and property, or laws for the general welfare, the only limitations to restrain its action must be found in the Constitution. This, in the larger sense, is an exercise of the police power by the general assembly, and falls fully within legislative power, and sustains the enactment under consideration.

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It is urged that the law is not general, but applies to the private patrons of those factories, to secure them against the acts of their commission merchant or milk broker, and is class legislation. We fail to perceive that this is not a general law. It embraces all persons in the State similarly engaged. If all laws were held unconstitutional because they did not embrace all persons, few would stand the test. The law defining the crime of horse stealing is intended for the protection of the owners of such animals, and they form a class; but a large portion of persons in the State do not own such animals, and shall it be said that law is void because it is class legislation? It has never occurred to any one to urge such an objection against the law. The same may be said of most, if not all other laws, however general their character. A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced.

[Omitting other points.]

Judgment affirmed.

ADAMS V. PEOPLE.

(100 III. 444.)

Criminal law — murder — great bodily harm.

If men board a railway train, draw deadly weapons on a passenger, rob him, and by threats, intimidation and command cause him to jump from the train while it is in motion, and he is thereby killed, it is murder.

CONVICTION of murder. The opinion states the point.

Doolittle & English, for plaintiffs in error.

James McCartney, attorney-general, for people.

SHELDON, C. J. [Omitting other points.] Objection is taken to the giving and refusing of instructions. This instruction was given upon the part of the people:

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“The court further instructs the jury, for the people, that to prove the charge in the indictment there need be no laying of hands on the person of Patrick Knight, by the defendants, to put him from the car, in order to constitute the force therein alleged ; but that if defendants did, by threats of violence to the person, intimidation, or by displaying deadly weapons in a threatening manner, cause the said Patrick Knight to leap or jump from the car while in motion, as alleged in the indictment, under circumstances which would have caused a prudent man to do so, and thereby he was killed, as charged in the indictment, and if the jury so believe, from the evidence, beyond a reasonable doubt, that such are the facts, they should find the defendants guilty.”

The exception taken to this instruction is, that it is defective in not having the qualification that the defendants forced the deceased to jump from the car with intent to kill him, or that the killing was the probable and reasonable result of such jump. Intent to kill does not enter into the definition of murder. It is enough if the unlawful killing be with malice aforethought, either express or implied. Nor was it essential that death should have been the probable and reasonable result of the act which the defendants forced the deceased to do. It is sufficient that death or great bodily harm was the natural result. Forcing a person to do an act which causes his death renders the death the guilty deed of him who compelled the deceased to do the act. 3 Greenl. Ev., § 142. Malice may be proved by evidence of gross recklessness of human life, where, in any manner, the life of another is knowingly, cruelly and grossly endangered, whether by actual violence, or by inhuman privation or exposure, and death is caused thereby. 3 Greenl. Ev., § 147. Malice may be inferred where an act unlawful in itself is done deliberately, and with intention of mischief or great bodily harm to those on whom it may chance to light and death is occasioned by it. 2 Stark. Ev., § 951. The definition of murder, by our statute, is : “The unlawful killing of a human being, in the peace of the people, with malice aforethought, either express or implied. * * * Malice shall be implied where all the circumstances of the killing show an abandoned and malignant heart.” And in the statutory definition of involuntary manslaughter there is this provision : “Provided, always, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed

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in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder." The instruction presents fully a case of murder as thus defined by the statute.

Judgment affirmed.

PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY V.
DUGGAN.

(100 Ill. 537.)

Constitutional law — neglect to fence railways — attorneys' fees.

A statute making railways liable for stock killed by reason of neglect to fence their tracks, and for attorneys' fees in addition, is not unconstitutional..

ACTION for stock killed. The opinion states the case. The plaintiff had judgment below.

Stevens, Lee & Horton, for appellant.

Meeker & Smyser, for appellee.

SHELDON, C. J. This action was commenced before a justice of the peace, to recover the value of five hogs alleged to have been killed by a train on the railroad of the defendant. The case was appealed to the Circuit Court, and there tried before the court and a jury, resulting in a verdict for the plaintiff for \$55, upon which judgment was rendered, and on appeal to the Appellate Court for the Third District it was affirmed, and an appeal taken to this court, the requisite certificate having been made.

The suit was brought under the act of the general assembly relating to fencing by railroad companies, approved May 29, 1879. Laws 1879, 224, 225. The act imposes on all railroad companies the duty of fencing their tracks, maintaining cattle-guards, etc., and then uses the following language: "And when such fences or cattle-guards are not made as aforesaid, or when such fences or cattle-guards are not kept in good repair, such railroad corporation shall be liable for all damages which may be done by agents, engines or cars of such corporation to such cattle, horses, sheep, hogs, or other stock thereon, and reasonable attorneys' fees, in any

court wherein such suit is brought for such damages, or to which the same may be appealed," etc.

On the trial in the Circuit Court, the court, against the objection of the defendant, admitted evidence that \$15 was a reasonable attorney's fee for attending to the suit in that court, and the court instructed the jury that if defendant was liable for damages, it was also liable for reasonable attorney's fees in the case. The propriety of the allowance of the attorney's fee is the only question which is presented.

It is objected, first, that no claim for attorneys' fees was filed with the bill of particulars in this case; that that was simply a memorandum of the stock killed, and its value, and no notice was given defendant of such a claim for attorney's fees until the witness was called to prove their value. In respect of this we think the statute itself is sufficient notice to the defendant that the claim will be made, and the defendant should be prepared to make any resistance to it.

The next objection is that the attorney's fee cannot be included in the same judgment for damages done to stock by the company's trains. It is said that the statute gives an attorney's fee, but that the right to it is not perfect till the performance of the service for which it is given, and that it is a fixed rule of law that no recovery can be had in any suit, except for causes of action perfected before the commencement of the suit. Although this be the general rule of the common law, it is competent for the legislature to vary it in any given case so that we need but inquire here what was the legislative intention in this regard. The liability for attorneys' fees exists at the time the suit is commenced. It arises at the same instant with the suit for damages, and although it be that the services for which the attorney's fee is given are performed during the progress of the suit, the fee may most fitly and conveniently be assessed in the same suit with the damages. There is no substantial reason why the plaintiff should be put to an additional suit for the recovery of the attorney's fee. The law does not favor the multiplicity of suits. The mere technical reason that the attorney's services had not been rendered at the time of the commencement of the suit should weigh nothing against the intentment of the statute. The liability which is created by the act is for the damages and attorney's fees conjunctively, and in our opinion it was the intention of the legislature that they should be assessed

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together in one and the same action, such intention being derived from the language of the act.

The further objection is made that this provision for attorney's fees is unwarrantable, as being special legislation, in singling out one class of corporations and attaching this liability to one class of cases. This provision may be upheld as being in the nature of a penalty for non-compliance with the statutory duty of fencing. The requirement of the fencing of railroad tracks is not alone for the private benefit of the owners of stock along their lines, but it has respect to the public welfare as well, as a measure for the safety of travel on railroads. As a police regulation for the promotion of the public safety in that respect, the legislature may well require the fencing of their railroad tracks by railway companies, and provide penalties for securing performance of the duty.

The judgment must be affirmed.

Judgment affirmed.

CAMPBELL v. PEOPLE.

(109 Ill. 505.)

Criminal law — former acquittal — jurisdiction.

An acquittal in one county of the charge of receiving stolen goods is no bar to an indictment in another county for the same offense, unless it appears that the offense was committed in the former county.

CONVICTION of receiving stolen goods. The opinion states the case.

Albright & Hurben, and R. M. Davis, for plaintiff in error.

James McCartney, attorney-general, and William Schwartz, State's attorney, for People.

SCOTT, J. The indictment presented by the grand jury in the Circuit Court of Jackson county, at the December term, 1882, against Thomas Campbell, contains two counts. The first one charges defendant with receiving stolen goods, knowing the same to have been stolen, and the second charges him with unlawfully and feloniously aiding in concealing stolen property, knowing the same

to have been stolen. On being arraigned at the March term of the court, 1883, defendant entered a motion to quash the indictment, which motion being overruled by the court, he entered a plea of not guilty, on which a trial was had, but the jury failing to agree, they were discharged, and the cause continued. At the August term of court, 1883, defendant seems to have filed a special plea, in which it is averred, in substance, he was indicted in the county of Perry, at the October term, 1882, of the Circuit Court of that county, with one Robert C. Milburn, for the identical same offense, and that on the trial in the Circuit Court of that county he was acquitted. To the plea setting forth, with the usual formality, the proceedings had against defendant in the Circuit Court of Perry county, and his acquittal of the offense charged against him in the indictment, by the verdict of a jury, and the judgment of the court thereon, the State's attorney prosecuting filed a demurrer, which was by the court sustained. On the trial at that term of the court, on the plea of not guilty, filed at a former term, defendant was found guilty by the jury, and the term of punishment fixed at a period of three years in the penitentiary. Motions for a new trial and in arrest of judgment were severally overruled, and the court pronounced judgment on the verdict.

The points made upon which defendant most confidently relies for a reversal of the judgment against him are, the court erred, first in sustaining the demurrer to the plea of *autrefois acquit*; second, in refusing certain instructions asked by defendant; and third, in permitting the State's attorney, in his closing argument to the jury on behalf of the people, to make remarks concerning defendant not warranted by the evidence, and which were calculated to prejudice his defense.

The principal question in the case arises on the decision of the court sustaining the demurrer to the plea of *autrefois acquit*. The plea contains a copy of the indictment found against defendant in the county of Perry, and it is seen it is an exact copy of the one found against defendant by the grand jury of the county of Jackson, and under which he was convicted, except the venue is laid in the county of Perry. The indictments in both counties contain two counts,—one for receiving stolen property, knowing it to have been stolen, and one for aiding in concealing stolen property,—and were found under section 239 of the Criminal Code, Rev. Stat. 1874. It is hardly necessary to state a principle so elementary, that if the

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Circuit Court of Perry county had no jurisdiction to try defendant for the crime with which he is charged in Jackson county, its judgment would be no bar to the present prosecution. Under the Constitution and laws of this State, as at common law, the local jurisdiction of all offenses is in the county where the offense is committed. See art. 2, sec. 9, Const. 1870, and sec. 395 of the Crim. Code, Rev. Stat. 1874. The statute, it will be seen, follows closely the Constitution, and declares, "the local jurisdiction of all offenses not otherwise provided by law shall be in the county where the offense was committed." Among the provisions for jurisdiction of the same offense in more than one county, is where, as in section 399 of the Criminal Code, which provides, concerning jurisdiction in larceny, that "where property is stolen in another State or country, and brought into this State, or is stolen in one county of this State and carried into another, the jurisdiction shall be in any county into or through which the property may have passed, or where the same may be found." This latter statute is simply declaratory of the common law on the same subject. Larceny, under the laws of this State, "is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another." The common law, which contained the same definition of larceny, seems to have regarded the felony as having been committed where the goods were feloniously stolen, but for the purposes of jurisdiction the offense was treated as having been committed within any jurisdiction into which the property was afterward carried. The rule on this subject proceeds on the legal assumption that where the property has been feloniously taken, every act of removal may be regarded as a new taking and asportation. 3 Gray, 434. That is the meaning of the statute of this State concerning jurisdiction in larceny cases. It has no application however to any crime other than larceny. The offense or offenses with which defendant stands charged are not embraced within the terms of the statute.

The plea of *autrefois acquit* is grounded on that principle of the common law, and which has been incorporated in the Constitution of this State, no person shall "be twice put in jeopardy for the same offense." A former acquittal may always be pleaded to a second indictment for the same offense, which implies that the court that pronounced the judgment of acquittal had jurisdiction of the cause. The principle is of course familiar, but there is often

some difficulty met with in its application. Generally the rule is, as at common law, an acquittal in one county can only be pleaded in the same county, and the reason assigned is, because all indictments are local, and therefore if the first were laid in a wrong county the defendant could not be found guilty upon it, and consequently was in no danger, and therefore could not plead an acquittal upon it in bar of a subsequent indictment for the offense in the proper county. *Vaut's case*, pt. 4, Co. 43 d, Com. Dig. Indict. L.; 1 Whart. Crim. Law, 553, ed. of 1874; *Marshall v. State*, 19 Ohio St. 363. But at common law there were exceptions to this general rule, and one of the exceptions most frequently noted is in cases of larceny where jurisdiction might be where the felony was in fact committed, or in that jurisdiction into which the property might be carried, and that exception, as well as some others, exists under the laws of this State. Among other exceptions, under our laws, is where the venue is changed, under the statute, from one county to another.

It is said by text writers, the crown may either traverse or demur to the plea of *autrefois acquit*. The same practice would no doubt prevail under our system of jurisprudence. In this case the question as to the sufficiency of the plea to bar the prosecution arises on a demurrer to it, interposed by the people. The rule laid down by Blackstone as to pleas of this character has been adopted by this court in *Freeland v. People*, 16 Ill. 380, and is, with reference to former acquittal or conviction, it "must be upon a prosecution for the same identical act and crime." All the authorities hold that to entitle a defendant to the benefit of this plea it is necessary the crimes charged in the first and second indictments should be the same, and that if the crimes charged in the first and second indictments are so distinct that the evidence of the one will not support the other, a conviction or acquittal of the one will not bar a prosecution of the other, or adopting the language of this court in *Freeland v. People*, the rule may be stated to be, that to make the plea at bar, proof of the facts alleged in the second indictment must be sufficient in law to have warranted a conviction upon the first indictment of the same offense charged in the second, and not of a different offense. The general rule adopted for ascertaining the identity of the offenses is as stated by Archbold in his work on Criminal Pleading, 106, where it is said: "The true test by which the question whether the plea is a bar in any particular case, may be tried

is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first." Substantially the rule has been stated in the same way by Chitty in his work on Criminal Law, and as stated by both authors it has been adopted by this court. Applying these well understood principles to the plea being considered, the case ought not to present any great difficulty. Would proof of the facts alleged in the indictment in Jackson county have warranted a legal conviction on the indictment in Perry county? That is one of the tests, it is said, must be applied, and it is obvious the question admits of only a negative answer. Certainly the offense of receiving stolen property in Perry county, knowing it to have been stolen, is not the same offense as receiving stolen property in Jackson county with a like guilty knowledge. As a matter of law they are distinct offenses — as much so as a murder committed in one county is a distinct crime from a murder committed in another county. Proof of a murder committed in one county would not sustain a prior indictment for the same murder in another county; nor could the first acquittal be pleaded in bar of a second indictment found in the county where the crime was in fact perpetrated, and the reason is, because in the judgment of the law the accused was not in jeopardy on the first indictment. The principle is, as at common law, if the offense charged in the second indictment is in one king's reign, and the first indictment was confined by the *contra pacem* to the preceding reign, an acquittal upon the first could not be pleaded in bar to the second. The ground upon which that principle is said to rest is, the *contra pacem* tied up the prosecution to proof of an offense in a particular reign. By our system of pleading, the venue, as laid in the indictment, confines the prosecution to proof of an offense committed in a particular county, as effectually as the proof was limited by the *contra pacem regis* at common law to an offense committed in the reign of a particular king.

It is the settled law that an acquittal on one indictment, in order to be a good defense to a subsequent indictment, must be an acquittal of the same identical offense as that charged in the second indictment. That fact must in some way appear from the plea itself, and that the offenses charged in both cases were the same in law and in fact. *Commonwealth v. Roby*, 12 Pick. 496. The question must be determined by the facts appearing from the record, without the aid of extrinsic circumstances. All questions arising

on demurrer to pleadings must, of course, be determined without reference to any evidence that may thereafter be given on the trial of the cause. It is not always enough the two indictments may appear to be in precisely the same words. That may well be, and yet the offenses distinct felonies, as for instance, where there are two indictments for rape, it might be the same person committed a rape upon two women of precisely the same name, and an acquittal on one indictment would not bar a prosecution on another, unless it was made to appear in some way it was identically the same offense. But the best, and perhaps the most accurate, test given in the books is, as before stated, would the evidence necessary to sustain the facts alleged in the second indictment have been sufficient to sustain a legal conviction on the first indictment. In the case being considered it is so plain it need not be elaborated further, that proof defendant had received stolen property in Jackson county, knowing it to have been stolen, would not have sustained an indictment for the identical same offense in Perry county. The plea might have shown, had that been the fact, that the Perry county Circuit Court got jurisdiction by change of venue to try defendant on a proper indictment for receiving stolen goods in Jackson county, and such a plea would have been a bar to a prosecution on a second indictment in Jackson county for the same offense. That was not done, simply because it would have availed nothing. It has been seen original jurisdiction of an offense, like the one charged in the first count of the indictment against defendant, is necessarily local, and is confined to the courts of the county where the offense is committed, and an acquittal elsewhere is as nothing in law. The plea in this case is in the usual form given where it is filed in the same county where the trial was had on the first indictment, to a second indictment in the same court for the same offense. But that is not sufficient in a case like the one being considered. Here the plea is defective, because it does not show, by way of averment, that the Circuit Court of Perry county in any way, or for any cause, obtained jurisdiction to try defendant for the crime of receiving stolen goods, with guilty knowledge, in the county of Jackson, and therefore it is obnoxious to the demurrer.

[Omitting other questions.]

Judgment affirmed.

Peck v. Herrington.

PECK V. HERRINGTON.

(100 Ill. 611.)

Water and water-courses — surface water — pond drainage.

The owner of upper land, on which there is a pond fed only by surface water, when good husbandry requires it, may drain the same by an artificial drain into its accustomed outlet or natural drain, notwithstanding the flow over the land of a lower proprietor may thereby be increased.

BILL for injunction, granted below. The opinion states the case.

Charles Wheaton, Nichols & Clapsdille and F. Green Garfield,
for appellants.

B. C. Cook, for appellee.

PER CURIAM. Much evidence was introduced on the hearing of this cause, which has been carefully considered, and while there is some conflict in the testimony, yet upon the main points involved there is no more conflict than may be expected where so many witnesses have been examined. The Appellate Court, as appears from the record, found the facts differently from the Circuit Court, and from the facts so found arrived at a different conclusion from the one reached by the Circuit Court, and hence reversed the decree which had been rendered in the Circuit Court.

Without undertaking to determine whether all the facts found by the Appellate Court are fully justified by the evidence, we think it is clear, from the testimony heard on the trial, that the land of appellant Peck lies much higher than the land of appellee Herrington. From "A," the pond on the land of Peck, along the dotted line on the map in evidence, to "I," where the water is discharged on Herrington's land, there is a gradual descent, the pond "A" being 20.73 feet higher than the point "I." From "I." across Herrington's land to Mill creek, at point "L," there is a fall of 10.17 feet, which makes a fall of 30.89 feet from the pond on appellant's land to "L" the surface of the water of Mill creek. It also appears from the evidence, that during the wet portion of the season, for

many years, there has been a natural flow of surface water along or near the dotted line from "A" to "I."

[Omitting evidence.]

It also appears from the evidence that at point "D," marked on the map, the land was originally quite flat, and after long continued rains the water would stand upon it for a time. In 1854 the land now owned by Herrington was owned by one John Bullard, who also owned the land extending from "D" to "E," and for a distance of fifteen rods west of "E." At the date last named, by the consent and with the authority of Bullard, the then owner, the natural channel of the surface water from "D" to "E," and fifteen rods west, was deepened, and since that time no water has been known to stand at the point "D." It also appears from the evidence that the tile drain which Peck proposed to put in when the injunction was served extended from "A" to "C," where the water would be discharged in the natural channel where the surface water had run for many years. The point "C," which appellant designed as the outlet for the tile drain, was on his own land, and a distance of more than half a mile from Herrington's land. Under such circumstances, did appellant Peck have the right to tile-drain the ponds, and turn the water therein in the channel which had for a number of years carried off the surface water?

It is not denied, as we understand the argument, that the owner of a dominant heritage may, by ditches or drains, drain his own land into the natural and usual channel or water-course, even if the quantity of water thrown upon the servient heritage is increased. But it is said there is no natural water-course here into which the ponds could be drained, and in support of this position we have been referred to *Hoyt v. City of Hudson*, 27 Wis. 656, and other like cases in that State, where it was held that a water-course or natural channel is a stream usually flowing in a particular direction in a definite channel, and discharging into some other stream or body of water, and the term does not include surface water conveyed from a higher to a lower level, for limited periods. It is a sufficient answer to the position taken that the rule established in Wisconsin has never been adopted in this State, but on the other hand, the same rule has been applied to surface water flowing in a regular channel as is applied to a water-course. The following cases will be found to be in point on the question: *Gilham v. Madison County R. Co.*, 49 Ill. 484; *Gornley v. Sanford*, 52 Ill.

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158. In the last case cited, it is said: "It is admitted that the water which flowed from Sanford's to Gormley's land, the obstruction of which is the basis of the action, is wholly surface water, * * * and much of the argument has been addressed to the question whether the same law in regard to drainage which applies to well defined water-courses is applicable to cases of this character." This question has already been decided in *Gillham v. Madison County R. Co.*, 49 Ill. 484. In the opinion filed in that case we said: "Although there was a conflict of authorities among the courts of this country, yet the rule forbidding the owner of the servient heritage to obstruct the natural flow of surface waters, was not only the clear and well settled rule of the civil law, but had been generally adopted in the common-law courts both of this country and of England. * * * The cases asserting a different rule for surface waters and running streams furnish no satisfactory reason for the distinction."

We now come to the main question in the case. Had Peck the right to drain the water from the ponds and discharge the same on his own land in the channel which carried the surface water from his land to that owned by Herrington? It may be regarded as a well-settled principle of law that where two farms adjoin, and one lies lower than the other, the lower farm will be subject to the natural flow of water from the one which lies in a more elevated position — or as declared by Washb. Ease. Serv. 353: "It may be stated as a general principle that by the civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snow and the like upon one naturally descends upon the other, it must be suffered by the lower one to be discharged upon his land if desired by the owner of the upper field." The owner of the upper field in such a case has a natural easement, as it is called, to have the water that falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude in the nature of dominant and servient tenements. *Id.* 355. It may also be regarded as a well settled rule that the owner of the upper field cannot construct drains or ditches so as to create new channels for water in the lower field, but he may make such drains, for agricultural purposes, on his own land as may be required by good husbandry, although by so doing the flow of water may be increased in a regular, well-defined channel, which carries the water from the upper to the lower field.

But it is said that the owner of the dominant heritage cannot drain natural ponds of water from his own land upon the land of his neighbor below him. The ponds which Peck proposed to drain were merely the collection of surface water from rain and melting snow, which fell upon the land. Suppose Peck, instead of tile-draining the ponds, had filled them up with dirt. This would have caused the water which before accumulated in the ponds to flow down the channel indicated on the map by the dotted line, upon the land of Herrington. It will not be pretended that in such a case he would have violated any rule of law. As was said in *Goodale v. Tuttle*, 29 N. Y. 459 : In respect to the drainage of surface water, there is no principle which will prevent the owner of land from filling up the wet and marshy places to his own advantage, because his neighbor's land is so situated as to be incommoded by it. If it be true that the water which would naturally accumulate in these ponds could be cast upon Herrington's land by filling them up, upon what principle can the owner of the dominant heritage be denied the right to do the same thing in another way ? If the water which would naturally accumulate in those ponds can be turned upon Herrington's land by filling them up, we perceive no reason why the water may not be drawn off by tile-drainage, if good husbandry required it. These were small ponds, the largest one containing only three acres. Good husbandry did not in our judgment require Peck to keep this collection of water standing on his farm and gradually seeping into his other land and thus making it unfit for cultivation ; but on the other hand we are of opinion that he had the right to tile-drain the ponds and carry off the water in the natural channel leading from "A" to "I," although the flow of water would thereby be increased. This view of the subject we believe to be reasonable and well sustained by authority. *Martin v. Riddle*, 26 Penn. St. 415 ; *Kauffman v. Griesemer*, 26 Penn. St. 407 ; *Miller v. Laubach*, 47 Penn. St. 154 ; *Broadbent v. Ramsbotham*, 11 Exch. 602 ; *Rawstron v. Taylor*, 11 Exch. 369 ; *Frazier v. Brown*, 12 Ohio St. 294.

It may be true that the owner of a tract of land would have no right to drain a lake or large body of water upon the land of an adjoining owner and thus destroy it ; but such is not this case. These small ponds rendered much of the land of Peck unfit for cultivation and good husbandry required that they should be drained, and so long as the water was discharged in the regular

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channel leading from the land of Peck to that of Herrington he has no legal ground of complaint. The natural flow of the surface water was not changed by the drainage. It may have been increased, but such increase of water was a burden which the location of the two tracts of land demanded should be borne by the owner of the lower tract of land. As was said in *Kauffman v. Griesemer, supra*: "Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow or fall upon the superior."

The judgment of the Appellate Court will be reversed and the cause remanded.

Judgment reversed.

DICKEY, J., dissents.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

STOUT V. SMITH.

(98 N. Y. 25)

Fraud — constructive — attorney and client.

The facts that a party to a contract is an attorney, and offers to and does draw the necessary writings gratuitously, do not establish the relation of attorney and client nor raise the presumption of fraud or undue influence.

ACTION of damages for fraud. The opinion states the case. The plaintiff had judgment below.

David B. Hill, for appellant.

Rufus King, for respondents.

MILLER, J. This action was brought to recover damages on account of fraud arising out of various transactions in the exchanging or sale of farms between the defendant and Alfred and Andrew Stout, the latter being now dead. Alfred and Andrew were colored people, and owned a farm in the town of Hector, Schuyler county, together with personal property, and it is claimed that the defendant defrauded them out of this farm and property. The principal acts, constituting the transactions between the parties, consisted of

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the sale of this farm in Hector, to the defendant, by his obtaining from the Stouts a deed of the same; the sale to them by written contract of defendant's farm; the surrender of this contract afterward, and the sale back to them in 1872 of the Hector farm by a written contract with defendant; the surrender of this contract; the alleged fraudulent settlement in the spring of 1873, and the sale of the Stout farm at that time by the defendant to a third person.

The complaint alleges that all the dealings and transactions between the defendant and the Stouts, above referred to, were fraudulent and dishonest; that they were all part of a scheme on his part to cheat and defraud Alfred and Andrew out of their property, and were all done by defendant for that purpose; that by these means he did cheat and defraud them out of all their property; that Alfred and Andrew signed papers for defendant without reading them, and that they signed some paper relating to the personal property on said farm, which paper was fraudulently obtained by defendant, and may have signed other papers to defendant, which, if so, were also procured by fraud; that the defendant could get them to sign any paper he wished to. The complaint contained allegations of other fraudulent acts, and claimed damages by reason of the fraud and deceit practiced.

The trial of the cause involved an inquiry into the various transactions between Alfred and Andrew Stout, and the defendant, and evidence was introduced by the plaintiffs to establish the fraudulent acts alleged, and by the defendant in contradiction of the same. After the close of the testimony the judge charged the jury, reviewing the facts and responding to various requests made by the counsel for the appellant. Among other things he was requested to charge, "that there is not sufficient evidence of undue influence to justify the jury in relieving the Stouts from their contracts upon that ground." This request was refused and an exception taken. The judge was also requested to charge, "that there is not sufficient evidence that on June 30, 1871, the relation of attorney and client existed between the defendant and the Stouts." This was also refused and an exception taken, and it is now insisted by the appellant's counsel that each of these rulings was erroneous.

As the determination of the question arising under the first request depends somewhat upon the disposition made of the last request the latter will be first considered.

We think there was no sufficient evidence that the relationship of attorney and client existed between the defendant and the Stouts. Although the defendant was an attorney at law, his principal business was that of a banker, and he did not practice law to any great extent, only making collections for his bank, and occasionally for others. There is no positive evidence that he was employed by the Stouts, as their attorney in these transactions, or that he ever received any pay for his services as such attorney, or that he was ever employed by them in any litigation. On the contrary, it is proved by one of the Stouts himself, that he was the attorney against them in the foreclosure of a mortgage. The evidence, which it is claimed shows that this relationship existed, is within a narrow compass, as will be seen by a brief reference to the same. Alfred Stout, after stating that defendant had never been employed by him as an attorney up to the time of the transactions in question, testified that the defendant did all the writing between them and stated that it would not cost the Stouts any thing, and that they need not carry the papers to anybody else to show them, because they were right; that he claimed to be a lawyer, which fact the witness knew, and said he would not wrong them out of a cent. Lydia Stout, the widow of Andrew, deceased, who was present at the time mentioned by Alfred, states that she heard no more about his being a lawyer than that he claimed that he was when he wanted to draw up the papers; that he was a lawyer and his writing should not cost him any thing; that he was a lawyer and could do the business.

This evidence taken together does not establish that the relationship of attorney and client existed between the parties. The fact that the defendant was an attorney, and that he was willing to do all the writing without compensation, is not enough to show the existence of such a relationship. The papers which were drawn were in proper form, and no legal advice was required in regard to the same. No advice was offered or obtained, and the defendant never received a retainer or agreed to act as an attorney for the Stouts. It nowhere appears that he assumed the obligations of a professional man in these transactions, or that the Stouts regarded him as acting in that capacity. He was merely engaged as an individual in making a bargain for the sale or exchange of real estate, and evidently drew up the papers gratuitously without assuming to act as attorney for the Stouts. The defendant, as an individual, had a perfect right to make a bargain with the Stouts as he did,

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and draw up the papers without charge, and he did not thereby necessarily place himself in the position of the attorney or adviser of those with whom the bargain was entered into. If he, in these transactions, gained any advantage, it did not arise from the relationship of attorney and client, but from the fact that he was dealing with persons of less capacity than himself to make a bargain or transact business. He may have been chargeable with deceit and fraud, and therefore liable if they were proved against him, but under the circumstances there seems to be no valid ground for the contention that he was liable for a violation of his duty in a professional capacity. As the case stood, there was not sufficient evidence to establish the fact that the relationship of attorney and client existed between the defendant and the Stouts, and that question was improperly submitted to the consideration of the jury.

We are also of the opinion that the court erred in submitting the question of undue influence to the jury. As the relationship of attorney and client did not exist between the defendant and the Stouts, it is difficult to see upon what ground it can be claimed that undue influence was exercised over them in the transactions between the parties. Undue influence is generally understood to constitute the power which one party wrongfully exercises over another in attempting to control the judgment and influence the action of such other person for the benefit of himself. The evidence in this case does not show any such confidential relationship or intimacy between the parties as would authorize the conclusion that the defendant improperly influenced the Stouts in the transactions he had with them. Nor is it apparent from the position he occupied, that the defendant possessed the power to induce the Stouts to act against their own interest, or that any such control was exercised by him. Alfred and Andrew were possessed of ordinary intelligence, could read and write, and had an opportunity to examine, or to have examined the papers which passed between them and the defendant, and there is no evidence in the case which tends to establish that in the various transactions between the parties they were induced by the defendant, by means of undue influence, to act in opposition to what they supposed was for their own benefit. The fact that the defendant was engaged in a business from which it may be inferred that he was better qualified to make bargains and to obtain advantages by reason of his capacity, shrewdness and superior ability, does not of itself lead to the conclusion that any advantage was

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obtained by means of undue influence. He may have deceived and he may have defrauded the Stouts in his dealings with them, but it cannot, we think, be maintained that he did so through any improper influence employed for that purpose. A person of great intelligence, experience and adroitness in business affairs will naturally have an advantage over one more ignorant and less qualified to engage in such matters, and the superior mind must necessarily exercise more or less control over the inferior, but this is not undue influence. If a man deals dishonestly, and is chargeable with fraud and deceit in his transactions, he is liable to answer on that account. Such conduct however, in the absence of any definite and established relation of confidence, does not furnish any valid legal ground for setting aside a contract in an action for the recovery of damages by reason of undue and improper influence exercised over the party with whom he has been dealing. The evidence given upon the trial mainly bore upon the question of fraud and deceit practiced by the defendant upon the Stouts, and as the facts developed did not establish undue influence they do not require an elaborate examination. It is sufficient to say that in view of the evidence, a case involving the principle of undue influence does not arise, nor was it proper to present any such question to the consideration of the jury.

Several questions as to the admissibility of evidence were raised upon the trial, but inasmuch as a new trial must be granted for the reasons already stated, it is not necessary to consider them.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur, RUGER, C. J., and EARL, J., on first ground.

IN MATTER OF JACOBS.

(98 N. Y. 98.)

Constitutional law — restraint of trade.

A statute making it a misdemeanor to manufacture cigars in cities of more than five hundred thousand inhabitants, in any tenement-house occupied by more than three families, except on the first floor of houses on which there is a store for the sale of cigars and tobacco, is unconstitutional. (See note, p.648.)

HABEAS CORPUS. The opinion states the case.

Peter B. Olvey, district-attorney, for appellant.

Wm. M. Everts, A. J. Dittenhæffer and Morris S. Wise, for respondent.

EARL, J. The relator Jacobs was arrested on the 14th day of May, 1884, on a warrant issued by a police justice in the city of New York under the act, chapter 272 of the laws of 1884, passed May 12, entitled "An act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement-houses in certain cases, and regulating the use of tenement-houses in certain cases." On the evidence of the complainant he was by the justice committed for trial, and thereafter upon his petition, a justice of the Supreme Court granted a writ of *habeas corpus*, to which a return was made, and upon the hearing thereon the justice made an order dismissing the writ and remanding him to prison. From that order he appealed to the General Term of the Supreme Court, which reversed the order and discharged him from prison, on the ground that the act under which he was arrested was unconstitutional and therefore void. The district-attorney on behalf of the people then appealed to this court, and the sole question for our determination is, whether the act of 1884, creating the offense for which the relator was arrested, was a constitutional exercise of legislative power.

The facts as they appeared before the police justice were as follows: The relator at the time of his arrest lived with his wife and two children in a tenement-house in the city of New York in which three other families also lived. There were four floors in the house, and seven rooms on each floor, and each floor was occupied by one family living independently of the others, and doing their cooking in one of the rooms so occupied. The relator at the time of his arrest was engaged in one of his rooms in preparing tobacco and making cigars, but there was no smell of tobacco in any part of the house except the room where he was thus engaged.

These facts showed a violation of the provisions of the act which took effect immediately upon its passage and the material portions of which are as follows: "Section 1. The manufacture of cigars or preparation of tobacco in any form on any floor, or in any part

of any floor, in any tenement house is hereby prohibited, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking or doing any household work therein. Section 2. Any house, building or portion thereof occupied as the home or residence of more than three families living independently of one another, and doing their cooking upon the premises, is a tenement-house within the meaning of this act. Section 3. The first floor of said tenement-house on which there is a store for the sale of cigars and tobacco shall be exempt from the prohibition provided in section one of this act. Section 5. Every person who shall be found guilty of a violation of this act, or of having caused another to commit such violation, shall be deemed guilty of a misdemeanor, and shall be punished for every offense by a fine of not less than ten dollars and not more than one hundred dollars or by imprisonment for not less than ten days and not more than six months, or both such fine and imprisonment. Section 6. This act shall apply only to cities having over five hundred thousand inhabitants."

What does this act attempt to do? In form, it makes it a crime for a cigarmaker in New York and Brooklyn, the only cities in the State having a population exceeding 500,000, to carry on a perfectly lawful trade in his own home. Whether he owns the tenement-house or has hired a room therein for the purpose of prosecuting his trade, he cannot manufacture therein his own tobacco into cigars for his own use or for sale, and he will become a criminal for doing that which is perfectly lawful outside of the two cities named — everywhere else, so far as we are able to learn, in the whole world. He must either abandon the trade by which he earns a livelihood for himself and family, or if able, procure a room elsewhere, or hire himself out to one who has a room upon such terms, as under the fierce competition of trade and the inexorable laws of supply and demand, he may be able to obtain from his employer. He may choose to do his work where he can have the supervision of his family and their help, and such choice is denied him. He may choose to work for himself rather than for a taskmaster, and he is left without freedom of choice. He may desire the advantage of cheap production in consequence of his cheap rent and family help, and of this he is deprived. In the unceasing struggle for success and existence which pervades all societies of men, he may be deprived of that which will enable him to maintain his hold, and to survive. He

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may go to a tenement-house. and finding no one living, sleeping, cooking or doing any household work upon one of the floors, hire a room upon such floor to carry on his trade, and afterward some one may commence to sleep or to do some household work upon such floor, even without his knowledge and he at once becomes a criminal in consequence of another's act. He may go to a tenement-house, and finding but two families living therein independently, hire a room, and afterward by subdivision of the families, or a change in their mode of life, or in some other way, a fourth family begins to live therein independently, and thus he may become a criminal without the knowledge, or possibly the means of knowledge that he was violating any law. It is therefore plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement-house who is a cigarmaker, and trammels him in the application of his industry and the disposition of his labor, and thus in a strictly legitimate sense it arbitrarily deprives him of his property and of some portion of his personal liberty.

The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated ; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived ; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.

The constitutional guaranty would be of little worth, if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein. If the legislature has the power under the Constitution to prohibit the prosecution of one lawful trade in a tenement-house, then it may prevent the prosecution of all trades therein. "Questions of power," says Chief Justice MARSHALL in *Brown v. State*, 12 Wheat. 419, "do not depend upon the degree to which it may be exercised. If it may be exercised at all it must be exercised at the will of those in whose hands it is placed." Blackstone in his classification of fundamental rights says : "The third absolute right inherent in every

Englishman is that of property which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution, save only by the law of the land." 1 Com. 138. In *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177, MILLER, J., says: "There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution." In *Wynehamer v. People*, 13 N. Y. 378, 398, COMSTOCK, J., says: "When a law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power." In *People v. Otis*, 90 N. Y. 48, ANDREWS J., says: "Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision."

So too one may be deprived of his liberty, and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, means the right not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation. All laws therefore which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection. In *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, FIELD, J., says: That among the inalienable rights as proclaimed in the Declaration of Independence "is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same terms.

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The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." In the same case BRADLEY, J., says : "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States," of which he cannot be deprived without invading his right to liberty within the meaning of the Constitution. In *Live Stock, etc., Association v. Crescent City, etc., Co.*, 1 Abb. (U. S.) 388, 398, the learned presiding justice says : "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." In *Wynehamer v. People*, JOHNSON, J. says : "That a law which should make it a crime for men either to live in, or rent or sell their houses," would violate the constitutional guaranty of personal liberty. In *Bertholf v. O'Reilly*, 74 N. Y. 509, 515 ; s. c., 30 Am. Rep. 323, ANDREWS, J., says : That one could "be deprived of his liberty in a constitutional sense without putting his person in confinement," and that a man's right to liberty included "the right to exercise his faculties, and to follow a lawful vocation for the support of life."

But the claim is made that the legislature could pass this act in the exercise of the police power which every sovereign State possesses. That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society. Its exercise in extreme cases is frequently justified by the maxim *salus populi suprema lex est*. It is used to regulate the use of property by enforcing the maxim *sic utere tuo, ut alienum non laedas*. Under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other ; and in cases of great emergency engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called due process of law. The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes

restraints, the police power must be exercised in subordination thereto. Judge Cooley, speaking of the regulation by the legislature under the police power of the conduct of corporations holding inviolable charters, says: "The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety and welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations, in fact, and not amendments of the charter in curtailment of the corporate franchise." Const. Lim. (4th ed.), 719. In Potter's Dwaris on Statutes, 458, it is said that "the limit to the exercise of the police power can only be this, the legislation must have reference to the comfort, the safety or the welfare of society; it must not be in conflict with the provisions of the Constitution." In *Commonwealth v. Alger*, 7 Cush. 53, 84, SHAW, C. J., says, that the police power "was vested in the legislature, by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and sources of the power than to mark its limitations or prescribe limits to its exercise." In *Austin v. Murray*, 16 Pick. 121, 126, it is said: "The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such is not the object and purpose of the regulation." In *Watertown v. Mayo*, 109 Mass. 315, 319, COLT, J., says: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen." In the *Slaughter-house* cases, 16 Wall. 36, 87. FIELD, J., says: "All sorts of restrictions and burdens are imposed under the police power, and when these are not in conflict with any constitutional prohibitions or fundamental principles, they cannot be successfully assailed in a judicial tribunal. * * * But under the pretense of prescribing a police regulation, the State cannot be permitted to encroach upon

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any of the just rights of the citizen which the Constitution intended to secure against abridgment." In *Coe v. Shultz*, 47 Barb. 64, a learned judge speaking of the constitutional limitations upon the police power says: "I am not willing to concede that the legislature can constitutionally declare an act or thing to be a common nuisance, which palpably, according to our present experience or information, is not and cannot be under any circumstances a common nuisance, by the common-law definitions or common-law decisions. I am not willing to conclude that the legislature can constitutionally declare or authorize any sanitary commission or board to declare the keeping or the use, in any way, of sugar or vinegar to be a common nuisance, because the one is sweet and the other sour, or for any other reason. By such an unlimited power it is easy to see that any citizen might be deprived of his property without compensation, and without any colorable pretext that the public good required such deprivation." See also *Matter of Cheesebrough*, 78 N. Y. 232.

These citations are sufficient to show that the police power is not without limitations, and that in its exercise the legislature must respect the great fundamental rights guaranteed by the Constitution. If this were otherwise, the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, the welfare or the safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away.

Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public

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health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law. In *Matter of Ryers*, 72 N. Y. 1, FOLGER, J., speaking of the Drainage Act then under consideration, says: "The legislature has done no more than the Constitution permitted in providing in general terms a way for the promotion and preservation of the public health. It is still for the judiciary to see to it that each occasion presents the necessity for the work, and that the purpose to be reached is public." In *Town of Lake View v. Rose Hill Co.*, 70 Ill. 191; s. c., 22 Am. Rep. 71, the court, speaking of the police power, says: "As a general proposition, it may be stated that it is in the province of the law-making power to determine whether the exigencies exist calling into exercise this power. What are the subjects of its exercise is clearly a judicial question." Even the power of taxation, which is one of the broadest possessed by the legislature, is not without its limitations, and its action in reference thereto may be scrutinized by the courts; and that which is done under the guise of taxation may be condemned as sheer spoliation and confiscation without due process of law. *Weisner v. Village of Douglas*, 64 N. Y. 91; s. c., 21 Am. Rep. 586; *Stuart v. Palmer*, 74 N. Y. 183; *People v. Equitable Trust Co.*, 96 N. Y. 387. The legislature may condemn or authorize the condemnation of private property for public use, and it may in the exercise of its discretion determine when and upon what property the power of eminent domain may be exercised; but its exercise is not beyond the reach of judicial inquiry. Whether or not a use is a public one, which will justify the exercise of the power, is a judicial question. It may be difficult sometimes to determine whether a use is public or private. Although the legislature may declare it to be public, that does not necessarily determine its character; it must in fact be public, and if it be not, no legislative fiat can make it so, and any owner of property attempted to be taken for a use really private can invoke the aid of the courts to protect his property rights against invasion. *Rockwell v. Nearing*, 35 N. Y. 302; *Matter of Townsend*, 39 N. Y. 171; *Matter of Deansville Cemetery Association*, 66 N. Y. 569; *Matter of Eureka Basin Warehouse and Manufacturing Co.*, 96 N. Y. 42. The general government is one of limited powers particularly specified in the Federal Constitution. But in addition to the powers granted, it is provided in the Constitution that Congress shall have power "to make all laws which shall be necessary and proper for carrying into

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execution the foregoing powers." Under this provision, Congress is not the final judge of what is "necessary and proper," but its laws must have a legitimate end in view, must be within the scope of the Constitution, must be appropriate and plainly adapted to that end, and not prohibited by, but consistent with the letter and spirit of the Constitution; and whether the laws passed under the implied powers contained in the section cited are of the character mentioned and thus justified, is always open to judicial inquiry. *McCulloch v. Maryland*, 4 Wheat. 316, 421; *Hepburn v. Griswold*, 8 Wall. 603; *Legal Tender* cases, 12 Wall. 467; 110 U. S. 421. If it were for Congress to determine when these implied or incidental powers should be exercised, its powers would be without any restraint, and instead of being a body with limited powers, it would in its own discretion have general and unlimited power of legislation. "Whatever meaning," says Mr. Madison (1 Ann. of Cong. 1848), "the clause of the Constitution conferring all necessary and proper means to carry into effect the enumerated powers may have, none could be admitted that would give an unlimited discretion to Congress." And in *Marbury v. Madison*, 1 Cranch, 137, Chief Justice MARSHALL says: "To what purpose are limitations committed to writing, if those limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed." These citations are apt to show how the police power may, and how it ought not to be exercised, and how far its exercise is subject to judicial inquiry. A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the promotion of the public health, it must be a health law, having some relation to the public health.

We will now once more recur to the law under consideration. It does not deal with tenement-houses as such; it does not regulate the number of persons who may live in any one of them, or be crowded into one room, nor does it deal with the mode of their construction for the purpose of securing the health and safety of their occupants or of the public generally. It deals mainly with the preparation of tobacco and the manufacture of cigars, and its purpose obviously was to regulate them. We must take judicial notice of the nature and qualities of tobacco. It has been in general use among civilized men for more than two centuries. It is

used in some form by a majority of the men in this State, by the good and bad, learned and unlearned, the rich and the poor. Its manufacture into cigars is permitted without any hindrance, except for revenue purposes, in all civilized lands. It has never been said, so far as we can learn, and it was not affirmed even on the argument before us, that its preparation and manufacture into cigars were dangerous to the public health. We are not aware and are not able to learn that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture. We certainly know enough about it to be sure that its manipulation in one room can produce no harm to the health of the occupants of other rooms in the same house. It was proved in this case that the odor of the tobacco did not extend to any of the other rooms of the tenement-house. Mr. Secretary McCulloch, in his late annual report to Congress, in which he recommends the removal of the internal tax from tobacco that it might thus be placed upon a footing with other agricultural products, says: "An article which is so generally used and which adds so much to the comfort of the large numbers of our population who earn their living by manual labor cannot properly be considered a luxury." To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manipulation may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health. This law was not intended to protect the health of those engaged in cigarmaking, as they are allowed to manufacture cigars everywhere except in the forbidden tenement-houses. It cannot be perceived how the cigar-maker is to be improved in his health or his morals by forcing him from his home and its hallowed associations and beneficent influences, to ply his trade elsewhere. It was not intended to protect the health of that portion of the public not residing in the forbidden tenement-houses, as cigars are allowed to be manufactured in private houses, in large factories and shops in the two crowded cities, and in all other parts of the State. What possible relation can cigarmaking in any building have to the health of the general public? Nor was it intended to improve or protect the health of the occupants of tenement-houses. If there are but three families in the tenement-house, however numerous and gregarious their members may be, the manufacture is not forbidden; and it matters not how large the number of the occupants may be if they are not divided

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into more than three families living and cooking independently. If a store is kept for the sale of cigars on the first floor of one of these houses, and thus more tobacco is kept there than otherwise would be, and the baneful influence of tobacco, if any, is thus increased, that floor, however numerous its occupants, or the occupants of the house, is exempt from the operation of the act. What possible relation to the health of the occupants of a large tenement-house could cigarmaking in one of its remote rooms have? If the legislature had in mind the protection of the occupants of tenement-houses, why was the act confined in its operation to the two cities only? It is plain that this is not a health law, and that it has no relation whatever to the public health. Under the guise of promoting the public health the legislature might as well have banished cigarmaking from all the cities of the State, or confined it to a single city or town, or have placed under a similar ban the trade of a baker, of a tailor, of a shoemaker, of a woodcarver, or of any other of the innocuous trades carried on by artisans in their own homes. The power would have been the same, and its exercise, so far as it concerns fundamental, constitutional rights, could have been justified by the same arguments. Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time, we shall not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one.

When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must therefore pronounce it uncon-

stitutional and void. In reaching this conclusion we have not been unmindful that the power which courts possess to condemn legislative acts which are in conflict with the supreme law should be exercised with great caution and even with reluctance. But as said by Chancellor Kent (1 Com. 450): "It is only by the free exercise of this power that courts of justice are enabled to repel assaults and to protect every part of the government and every member of the community from undue and destructive innovations upon their charter rights."

The order should be affirmed.

Order affirmed.

All concur.

NOTE BY THE REPORTER.—See *Com. v. Beares*, 133 Mass. 542; s. c., 42 Am. Rep. 450; *Milliken v. City Council*, 54 Tex. 388; s. c., 38 Am. Rep. 629; *Davis v. State*, 68 Ala. 58; s. c., 44 Am. Rep. 128.

In *People v. Marx*, N. Y. Ct. App., June 16, 1885, a statute providing that "no person shall manufacture out of any oleaginous substance or substances, or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream of the same, or shall sell, or offer for sale, the same as an article of food," was held, unconstitutional, as it absolutely prohibited the manufacture or sale of any article which could be used as a substitute for butter, however fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances, capable of being applied to the same uses as articles of food. This was beyond the power of the legislature to do. (See case in full, 83 Albany Law Journal, 6).

In *State v. Addington*, 77 Mo. 110, defendant being prosecuted under the act prohibiting the manufacture and sale of oleomargarine, by way of establishing his point that the act was not a proper exercise of the police power, and was therefore unconstitutional, offered to show that oleomargarine was wholesome as an article of food. Held, that this offer was properly rejected. The constitutionality of the act could not be tested in that way. The court said:

"The position of the defendant in substance is, that if the wholesomeness of the article as one of food could be established, thereby the constitutionality of the act which forbids its sale would be overthrown. This is clearly a *non sequitur*. Such a position, if pushed to its logical conclusion, would utterly overthrow the exercise of the police power by the State; overthrow every law the wisdom of which could not bear the test of scrutiny. Proceeding on such a theory, a man arrested for killing game at an unlawful season, might appropriately offer to prove that the birds killed were injurious to the public or were destructive to crops. Or made to submit to sanitary regulations, might claim that there was no disease on board his ship, and therefore the law

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which compelled him to remain at quarantine, was an arbitrary infringement of his constitutional rights.

"We may make the broad concession that a State cannot, under the disguise of the police power, overthrow the rights which the Constitution guarantees; but notwithstanding this, it cannot be gainsaid that the legislature may do many things in the legitimate exercise of that and other powers, which however unwise or injudicious they may be, are not obnoxious to the objection of being beyond the scope of legislative authority. It would be exceedingly difficult, if not impossible, to state beforehand what in a number of cases, should be regarded as an assumption by the legislature of powers not warranted by the Constitution. Each case, to a certain extent, must be determined by its own circumstances, the court, in every instance, regarding the act to be investigated as *prima facie* constitutional. 'The right of the judiciary to declare a statute void and to arrest its execution, is one which in the opinion of all courts, is coupled with responsibilities so grave, that it is never to be exercised except in very clear cases; one department of the government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional takes upon himself the burden of proving beyond doubt that it is so.' *Erie & N. E. R. Co. v. Casey*, 28 Penn. St. 287.

"The central idea of the statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine article so closely in its external appearance, as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself, very strongly tends to confirm this view. If this was the purpose of the enactment now under discussion, we discover nothing in its provisions which enables us, in the light of the authorities, to say that the legislature, when passing the act, exceeded the power confided to that department of the government; and unless we can say this, we cannot hold the act as being anything less than valid."

TOLMAN V. SYRACUSE, BINGHAMTON AND NEW YORK RAILROAD COMPANY.

(98 N. Y. 196.)

Negligence — contributory — question of law.

The plaintiff's intestate was killed at a railroad crossing. The highway crossed the track at an acute angle. The deceased was driving a gentle horse, and the condition of the road was such as to prevent fast driving. The night was dark and misty, but plaintiff's own witnesses testified that the head-light of the engine could have been seen at a distance much more than sufficient to give warning, and to enable him to escape injury. *Held*, that the plaintiff should have been nonsuited. (*See note*, p. 658.)

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ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The plaintiff had judgment below.

Louis Marshall, for appellant.

T. K. Fuller, for respondent.

FINCH, J. A careful examination of the testimony given upon the trial leads us to the conclusion that upon the issue of defendant's negligence there was perhaps a question of fact for the jury. While the proof was extremely weak and its decided preponderance was against the plaintiff, it is difficult to say that there was none. It is not in the least doubtful that somewhere between the whistle post and the Jamesville crossing the bell of the engine was rung and the whistle sounded. That fact is established not merely by the evidence of the three persons on the engine who testify that they gave the signals, but by passengers on the train who heard them, one of whom was a witness for the plaintiff, and by two other persons who resided near the crossing. The fact is further and very conclusively corroborated by the circumstances that every one of the plaintiff's witnesses heard either the whistle, or the bell, or both. But the question when these signals were given; whether at the whistle post or at the crossing; whether before the accident or only at the moment of its occurrence, is left open to a possibility of doubt, and it may be, cannot be determined as matter of law. The whistle post was distant from the crossing about a quarter of a mile, and as the train was running not less than thirty miles an hour it took but thirty seconds to run from the signal point to the crossing, and the conflicting theories depend upon what occurred within that brief interval. Several witnesses for the plaintiff testify that the sounding of the whistle and the application of the air-brake, which last confessedly occurred at the moment of the accident, were contemporaneous, at the same instant, and without appreciable interval. While this evidence was largely matter of judgment, and extremely open to error or mistake, we cannot reject it wholly, and it is possible that it brought the issue within the province of the jury.

But upon the question of contributory negligence we disagree with the General Term. The burden was upon the plaintiff of showing affirmatively, either by direct evidence or the drift of surrounding circumstances, that the deceased was himself without fault, and approached the crossing with prudence and care, and

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with senses alert to the possibility of approaching danger. He must look and listen, and is excusable for the omission only when the circumstances show that both precautions were impossible or unavailing. There is no evidence, direct or inferential, of the exercise of such care and prudence by the deceased. He was familiar with the locality, and had often passed the crossing. The highway which he traveled from Syracuse approached the rails at a very acute angle, and for a thousand feet from such crossing gave an unobstructed view of the railroad. At the crossing, the track could be seen to the north for a distance of twenty-seven hundred feet, no obstacle intervening to bar the line of vision. The deceased left Syracuse after having indulged to some extent in the use of intoxicating liquor. One witness rode with him to the toll-gate and there left him, describing him as silent and dull. Some evidence indicates that he was awake at that point, but one of the men on the engine swears that as deceased approached the crossing his head was bent back upon some object behind him in the sleigh. This witness, it is said, was impeached by proof of contradictory statements. But excluding his evidence, it still remains apparent that the deceased, if awake and exercising his senses and the caution demanded by his situation, could have seen and might have avoided the train, unless the night was so dark that he could not see, and of such character and surroundings that the noise of an approaching train could not be heard. The burden of establishing affirmatively freedom from contributory negligence may be successfully borne, though there were no eye-witnesses of the accident, and even although its precise cause and manner of occurrence are unknown. If in such case the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or willful disregard of personal safety, and so a question of fact may arise to be solved by a jury and require a choice between possible, but divergent, inferences. If on the other hand, those facts and circumstances coupled with the occurrence of the accident do not indicate or tend to establish the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care, then the inference of negligence is the only one left to be drawn, and the burden resting upon the plaintiff is not successfully borne, and a nonsuit for that reason becomes inevitable.

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In the present case, except for the darkness of the night, there was no obstacle to the vision of the deceased for a long distance from the crossing. Neither houses, nor trees, nor inequalities of the land were obstacles to his sight for a distance from the crossing toward the approaching train of more than half a mile. His horse appears to have been quiet and kind, and susceptible of easy control. The approach to the crossing was quite bare of snow, naturally compelling a moderate speed of the sleigh. Unless therefore the facts disclose that the darkness and the mist were such as to make it impossible to see the head-light of the engine at a distance adequate for sufficient warning, it is a necessary inference that the deceased did not look, and that his death was the result of a blind or reckless movement upon the track, which ordinary care would have surely prevented. The very darkness made more necessary the duty of watchfulness, and if the deceased could have seen the lights of the train in season for safety, the accident itself demonstrates that he did not look, or that if he did, he ventured upon a hazardous effort to cross in spite of the danger. Now the evidence establishes, without the least contradiction, that to one approaching the crossing and looking to the west along the railroad, the head-light of the engine and the lights of the cars were visible for a distance great enough to give adequate warning. One of the plaintiff's own witnesses, upon the accuracy of whose observation and the truth of whose statement the plaintiff depended as showing that the train was at the crossing when the whistle sounded, clearly establishes the fact. He lived south and east of the crossing, at a distance of one thousand forty feet therefrom. He sat in a west room of his house, the outlook being toward the crossing, and his line of vision forming an acute angle with the track at that point, his house being three hundred and sixty-nine feet in a direct line from the rails. He sat by the window, and hearing a whistle, looked out, shading his eyes from the light of his room, and saw the lights of the train, and was able to locate it as at or just south of the crossing. Another of plaintiff's witnesses came to the depot soon after the accident, and noticed a train going north, and saw it near the water-tank. He added: "The train must have been sixty to eighty rods away then. I should think; there was no difficulty in my seeing it until after it passed the bend in the road; there was nothing in the character of the atmosphere that night which prevented my seeing the train sixty rods; I saw the lights on the hind end of it." Still another of

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plaintiff's witnesses, walking upon the track with his back to an approaching train, neither looking nor listening, and giving no heed to the possibility of danger, was startled by seeing the glow of the head-light in front of him in time to take the alarm and escape the danger. He thinks the train was eight or ten rods off when he became conscious of the light. If he saw it at that distance shining from behind his back, it is not at all doubtful, that looking toward the head light, it would have been visible at a very much greater distance. All the rest of plaintiff's witnesses, however they emphasize the darkness, admit their ability to have seen lights at varying distances. The lights of the houses as the train left the city, and the lanterns of the trainmen as they moved about the scene of the accident, were all visible. On the part of the defendant, one witness, passing soon after the accident, could see the lights of the houses and discern the fences and trees, and found his way without difficulty, though his horse was blind. Two others, one stationed over two hundred feet and the other about four hundred feet from the crossing, were able through their windows and under that disadvantage, to see the lights of the cars and so observe the passage of the train. Other witnesses found no difficulty in going to their homes, and noticed that objects at the roadside and lights in the houses were visible as they passed along. On this state of facts it is impossible to doubt that deceased might have seen the approaching train if he had looked for it, as a prudent man should. The facts leave the occurrence explainable as to its cause and occasion only by the theory of negligence on the part of deceased. They indicate no way in which the accident might have happened, suggest no adequate cause which could or might have operated, which way or cause showed freedom from fault on the part of deceased, and could have produced the result in spite of his care and prudence. The evidence leaves no rational ground for any other inference than one of neglect and want of care.

The judgment should be reversed and a new trial granted, costs to abide the event.

Judgment reversed.

All concur, except RUGER, C. J., not sitting, and DANFORTH, J., absent.

NOTE BY THE REPORTER.—In *Schofield v. Chicago, etc., R. Co.*, U. S. Supreme Court, May 4, 1885, it was held that where a person, in a sleigh drawn by one horse, on a wagon road, approaching a crossing of a railroad track,

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with which he was familiar, could have seen a coming train, during its progress through a distance of seventy rods from the crossing, if he had looked from a point at any distance within six hundred feet from the crossing, and was struck by the train at the crossing and injured, he was guilty of contributory negligence, even though the train was not a regular one, and was running at a high rate of speed, and did not stop at a depot seventy rods from the crossing in the direction from which the train came, and did not blow a whistle or ring a bell between the depot and the crossing, and a verdict for the defendant was properly directed.

The court, BLATCHFORD, J., said: "The suit was one to recover damages for personal injuries to the plaintiff, caused by his being struck by a train running on the railroad of the defendant, while the plaintiff, in a sleigh drawn by one horse, was endeavoring to cross the track on the 18th of February, 1881, at Newport, in Minnesota. The train was running north on the east bank of the Mississippi river, through Newport to St. Paul, about four o'clock in the afternoon, in daylight on Sunday. The track was straight from the crossing to a point two thousand three hundred and twenty feet south of it, and the country was flat and open. The plaintiff was himself driving, with a companion in the sleigh, in a northerly direction, on a wagon road which ran in the same general course with the railroad, and to the west of it, and attempted to cross it from the west to the east, as the train approached from the south. The crossing was seventy rods to the north of the depot at Newport. Opposite the depot, the wagon road was two hundred and eighty feet distant to the west of the depot. The plaintiff had a slow horse, and was following the beaten track in the snow. When he arrived at a point in the wagon road six hundred feet from the crossing, he could there, and all the way from there till he reached the crossing, have an unobstructed view of the railroad track to the south, and of any train on it, from the crossing back to the depot; and when he reached a point in the wagon road thirty-three feet from the crossing, he could have an unobstructed view to a considerably greater distance southward beyond the depot. The evidence shows that if the train had passed the depot when the plaintiff was at a point six hundred feet, or any less number of feet from the crossing, he could not have failed to see the train, if he had looked for it; and that if the train had not reached the depot when the plaintiff arrived at a point thirty-three feet from the crossing, he could not at that point or at any point in the thirty-three feet have failed to see the train beyond and to the south of the depot, if he had looked for it. When the train passed the depot the plaintiff was at least one hundred feet from the crossing. The train consisted of a locomotive engine and seven or eight cars. The engine whistled at a point four thousand, three hundred feet south of the depot which was the whistling place for that depot. The wind was blowing strongly from north to south. The man in company with the plaintiff was killed by the accident, as was the horse. The plaintiff resided in the neighborhood, and was familiar with the crossing. After the accident the men, horse and sleigh were found on the west side of the railroad, showing that they were struck as they were entering on the crossing. The train was not a regular one and no train was due at the time of the accident: it was moving at a high rate

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of speed; it did not stop at the depot; and it gave no signal by blowing a whistle, or ringing a bell, after it passed the depot.

"The ground upon which the Circuit Court directed a verdict for the defendant (2 McCrary, 268; s. c., 8 Fed. Rep. 488), was that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant. Applying the test, that if it would be the duty of the court, on the plaintiff's evidence, to set aside as contrary to the evidence, a verdict for the defendant, if given, the court had authority to direct a verdict for the defendant, it considered the case under the rules laid down in *Continental Improvement Co. v. Stead*, 95 U. S. 161, and especially in *Railroad Co. v. Houston*, 95 U. S. 697, and arrived at the conclusions of law that neither the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that hearing a whistle from it, as it was south of the depot, he supposed it would stop there, and so failed to look, but that in such case he would have been negligent, because it was not certain that the train would stop at the depot, and he would have had warning that a train was approaching; that the neglect of the train to blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and that the fact that he was at least one hundred feet from the crossing when the train passed the depot, and could then have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking.

"These conclusions of law approve themselves to our judgment, and are in accordance with the rules laid down in the cases referred to.

"In *Railroad Co. v. Houston* it was said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees, in these particulars, was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequence of her mistake and temerity cannot be cast upon the defendant.' The court added that an instruction to render a verdict for the defendant would have been proper. These views concur with those laid down by the Supreme Court of Minnesota in *Brown v. Milwaukee R. Co.*, 23 Minn. 165, and are in accord with the current of decisions in the courts of the States. It is the settled law of this court that when the evidence given at the trial, with all the inferences which the jury

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could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co. v. Munson*, 14 Wall. 442; *Pleasants v. Fant*, 23 Wall. 116; *Herbert v. Butler*, 97 U. S. 819; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 558; *Randall v. Baltimore & Ohio R. Co.*, 109 U. S. 478; *Anderson Co. Com'rs v. Beal*, 113 U. S. 227; *Baylis v. Travellers' Ins. Co.*, 113 U. S. 316. This rule was rightly applied by the Circuit Court to the present case."

See *State v. Maine Cent. R. Co.*, 76 Me. 357; s. c., 49 Am. Rep. 622.

In *Brown v. Milwaukee, etc. Ry. Co.*, 23 Minn. 165, referred to in the principal case, it was said :

"The fact is clearly established by the testimony of every witness upon the subject, and uncontroverted by any thereof in the case, that for the whole distance of at least eighty rods along the track from the crossing, a coming train is plainly visible, from any point in the public highway between the track and the end of the snow fence at the highway, to a person sitting in an ordinary lumber wagon. The same is true as to every part of the highway from Ferguson's to within two or three rods of such end of the snow fence, and as to these two or three rods it is stated that a train 'right close by' the crossing 'cannot be seen without looking through the fence.' It also appears that the head-light to the engine, at an elevation above the rails of ten to twelve feet, was lighted at the time of the accident, and that the height of the smoke-stack was about sixteen feet; that the light from the head-light was thrown out for from thirty to forty rods in front of the engine, and lighted up each side of the railroad to a distance of ten or fifteen rods. Assuming that the train traversed the last eighty rods before reaching the crossing at the highest rate of speed testified to, it must have occupied forty-five seconds in running it, and it is impossible to resist the conclusion that the head-light to the engine was plainly visible from any part of the highway along which deceased and Anderson were then travelling for the whole of this time, and during the last twenty seconds before the collision they must have been actually within the limits of the light thrown out from the locomotive.

"In view of the only testimony in the case based upon any kind of measurement — that the distance from the end of the snow fence to the crossing was thirty-one paces, or ninety-three feet — and the character of the estimates given by the other witnesses, it cannot reasonably be assumed that such distance was less than sixty feet. During the whole of the time occupied by them in driving over this space the train was in full view, and the light thrown from its head-light actually covering them most, and probably all the time. 'The horses went down the hill' to the track, says Anderson, 'at a moderate gait,' and it does not appear that they were frightened, or in the least unmanageable. No circumstance appears tending to show any difficulty in stopping for the train to pass at any point on this sixty feet, nor at any point before that.

"These clearly are circumstances requiring the application of the rule 'that if a traveller, by looking along the road, could have seen an approaching train in time to escape, it will be presumed, in case of collision, that he did not look, or, looking, did not heed what he saw.' Whart. Neg., § 382."

DeFreest v. Warner.

DEFREEST v. WARNER.

(98 N. Y. 217.)

Statute of limitations — acknowledgment to stranger — recital in deed.

A father conveyed his land to his sons by a deed declaring the land to be subject to and charged with the payment of certain notes made by him, forming part of the consideration, and assumed by the grantees. Held, a sufficient acknowledgment to take the notes out of the statute of limitations.*

ACTION on promissory notes. The opinion states the case. The plaintiff had judgment below.

Amasa J. Parker, for appellant.

Matthew Hale, for respondent.

EARL, J. This action was commenced in April, 1882, to recover on four promissory notes made by Michael Warner, the intestate, dated in 1871, 1872 and 1873, the last of which fell due in April, 1874. The defendants interposed as a defense the statute of limitations. To meet that defense the plaintiff introduced in evidence a deed of a farm dated April 2, 1875, executed by Michael Warner to his three sons, which deed contained the following clause: "The aforesaid piece and parcel of land is this day sold and conveyed by the said Michael Warner to the said Samuel S. Warner, Michael H. Warner and Albert Warner, subject to the following amounts due by me to the parties hereinafter specified, which forms a part of the consideration above expressed, and which I charge the above estate above conveyed with the payment thereof, and which said several amounts, together with the interest, the said parties of the second part assumes and agrees to pay, to Daniel DeFreest about \$600, to Mrs. DeFreest about \$400, together with the legal interest thereon." It is not questioned that the debts which the grantees thus assumed to pay were the notes described in the complaint in his action. Upon the trial the court denied the motion of the defendants to nonsuit the plaintiff, and directed a verdict for the amount of the notes; and the decision having been affirmed at the General Term, the defendants appealed to this court.

* See *Backman v. Roller* (9 Baxt. 409), 40 Am. Rep. 97.

The claim of the defendants is that the acknowledgment of the indebtedness contained in the deed by the intestate to his three sons was not sufficient to answer the bar of the statute of limitations, because it was not made to the holder of the notes. The learned counsel for the defendants contends that an acknowledgment to save a note from the statute of limitations must be made to the holder of the note, or to some one acting for him. It is not necessary in this case to determine whether or not that is a correct statement of the rule, for although sanctioned by the weight of authority in this State, the cases are not entirely harmonious on the subject. *Bryar v. Willcocks*, 3 Cow. 159; *Avery's case*, 6 Abb. Pr. 144; *Stuart v. Foster*, 18 Abb. Pr. 305; *Winterton v. Winterton*, 7 Hun, 230; *Ross v. Ross*, 6 Hun, 80; *Morrow v. Morrow*, 12 Hun, 386; *Fletcher v. Updike*, 67 Barb. 364; *Bloodgood v. Bruen*, 8 N. Y. 362; *Wakeman v. Sherman*, 9 N. Y. 85; *Pickett v. Leonard*, 34 N. Y. 175.

But even if the general rule be as claimed, this case is not within the rule. Where the acknowledgment is to a stranger, and it appears that it was the intention that the acknowledgment made to him should be communicated to and influence the creditor, it is just as effectual to defeat the statute of limitations as if it had been made directly to the creditor or his authorized agent. In *Wakeman v. Sherman* it was said by Judge GARDINER: "The promise must be made to the creditor or some one acting for him, or if made to a third person, must be calculated and intended to influence the action of the creditor." In *Winterton v. Winterton* the abstract of the case is as follows: "The law does not require that the acknowledgment of a debt, to render it effectual under the statute, should be exclusively and wholly made by the debtor to the creditor. It will defeat the operation of the statute, if made to the creditor's agent, or some person acting for him or in his interest, who may be reasonably expected to communicate it to him, and on which communication he may be expected to repose." In 1 Smith's Leading Cases, with Hare and Wallace's notes, page 975, the learned annotators say: "A debt may be revived by a promise or admission to a stranger, if it sufficiently appears that the intention was that the declaration made to him should be communicated to and influence the creditor."

The acknowledgment in the deed of the intestate to his sons was intended and well calculated to influence the action of the holder

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of the notes referred to. It must have been intended and expected that it would be communicated to the holder, and that it would influence his action, because the grantees were expected to make payments in the future to the holder. And whenever the provision in the deed thus came to the holder's notice he was bound thereafter to act upon the provision thus made. He was bound to receive payments from the grantees, and to recognize and treat them as the principal debtors, while the grantor remained simply surety for them. Thus we have a case where the acknowledgment was intended to influence the action of the creditor and which the creditor was bound to accept and act upon; and therefore it was just as effectual to prevent the operation of the statute as if made directly to him.

Therefore, concurring fully in the opinion pronounced by the court below, we think the judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except RAPALLO, J., dissenting. and DANFORTH, J., absent.

 EDWARDS V. NEW YORK AND HARLEM RAILROAD COMPANY.

(36 N. Y. 245.)

Landlord and tenant — implied warranty.

On a lease of a building for exhibition purposes, the galleries being designed only for a limited number of spectators, there is no implied warranty that they shall be safe for a turbulent crowd.*

ACTION for damages for injuries sustained by plaintiff by the falling of a gallery in a building in the city of New York designed for public entertainments, known as Gilmore's Garden, and leased by defendant to one Kelley for a pedestrian exhibition. It was conceded that "the gallery in question was built simply to accommodate a limited number, and not to be used for the purpose of such an exhibition as the walking match." The opinion states other facts. The defendant had judgment below.

Samuel D. Morris, for appellant.

Frank Loomis, for respondent.

* See *Bow v. Hunking* (185 Mass. 380), 46 Am. Rep. 471, and note, 474.

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EARL, J. There is an implied warranty upon an executory sale of merchandise that the property is in a merchantable condition; and upon the sale of a chattel by the manufacturer thereof, that the chattel is fit and suitable for the purpose for which it was intended and is purchased; and upon the sale of provisions for consumption, that they are wholesome and proper for use as food; but upon the demise of real estate, there are no such implied warranties. It is a universal rule, to which no exception can be found in any case now regarded as authority, that upon the demise of real estate there is no implied warranty that the property is fit for occupation, or suitable for the use or purpose for which it is hired. The only implied warranty in such case is one for quiet enjoyment. In *Jaffe v. Harteau*, 56 N. Y. 398; s. c., 15 Am. Rep. 438, it was held, as stated in the head-note, that "a lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises for their condition, or that they are tenantable and may be safely and conveniently used for the purposes for which they are apparently intended." Judge GROVER, writing the opinion, said: "There is no reason for holding the lessor, in the absence of any agreement or fraud, liable to the tenant for the present or future condition of the premises that would not be equally applicable to a similar liability sought to be imposed by a grantee in fee upon his grantor." In *Cirson v. Godley*, 26 Penn. St. 111, WOODWARD, J., said that there was a time when the English courts acted on the principle that it is an implied condition of every lease that the property is reasonably fit for the purpose for which it is let, but that those courts had receded from that rule, and now held that on the demise of land there is no implied obligation on the part of the lessor that it is fit for the purpose for which it is taken, nor in the lease of a house, that it is at the time of the demise, or shall be at the commencement of the term, in a reasonably fit state and condition for habitation; and he cited for the English rule the case of *Sutton v. Temple*, 12 M. & W. 52, which is ample authority for what he said. In *Francis v. Cockrell*, L. R., 5 Q. B. 501, KELLEY, C. B., said that there was no implied undertaking by the lessor that the demised real estate "shall be reasonably fit, or fit at all, for the purpose for which it is let, that is for the purpose of habitation. There is really no analogy at all between the case of a lessor and lessee of a house and the case of one who contracts for the supply of a carriage, or for

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the supply of a seat in a stand upon a race-course, or for the safe passage over a railway bridge. In the case of a lessor and lessee of a house, both parties, before the lease is granted and accepted, ascertain for themselves the condition of the premises, and they then enter into such express covenants as they may think fit for the repair of the premises, or for any other purpose incidental to the enjoyment of the premises." In Thompson on Negligence, 323, the learned author, citing many cases, says that in the absence of fraud or deceit, "there is no implied covenant that the demised premises are fit for occupation or the particular use which the tenant intends to make of them."

Therefore if any responsibility in this case attaches to the defendant, it cannot be based upon any contract obligation, but must rest entirely upon its *delictum*. If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. If he demises premises knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence which will in many cases impose responsibility upon him. If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. But where the landlord has created no nuisance, and is guilty of no willful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between cases of a demise of dwelling-houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him. If he lets a building for a warehouse, knowing that it is so weak and imperfectly constructed that the floors will break down from the weight necessarily to be placed upon them, his negligence imposes liability upon him for injury to the person or property of any one who may lawfully be upon the premises using them for the purposes for which they were demised. If one builds a house for public amusements or entertainments, and lets it for

those purposes, knowing that it is so imperfectly and carelessly built that it is liable to go to pieces in the ordinary use for which it was designed, he is liable to the persons injured through his carelessness. And this rule of responsibility goes far enough for the protection of lessees and of the public generally. It is but a just and reasonable application of the maxim, *sic utere tuo ut alienum non laedas*. It imposes liability upon the landlord for his *delictum*, and the tenant is also liable, not only for his negligence, but also upon the authority of the case of *Francis v. Cockrell*, by virtue of an implied contract which he makes with all the persons whom, for a compensation, he invites or induces to enter his building to witness public entertainments given therein by him or under his supervision. A rule which would place a greater responsibility upon a grantor or upon a landlord while out of possession and deprived of the control of his premises would, as stated in many cases, lead to much injustice, embarrassment and inconvenience. There is no case which holds that the negligence of a landlord is to be inferred simply from the fact that a structure which he lets break down. It may break down under such circumstances that the inference of negligence is irresistible and may properly be drawn; but the facts must show that he knew, or had reason to know, that the structure was dangerously weak and imperfect. In *Walden v. Finch*, 70 Penn. St. 460, in an action for an injury to property caused by the falling of a storehouse, the court said: "The principle appears to be this: that when the owner of a building has done all in his power to erect a safe structure for the purpose for which it is to be used, he is not liable to others for its occult defects. Of course this is to be taken with the qualification that he had no knowledge of the defect, and no reason to lead him to believe the building to be unsafe." In *Curson v. Godley*, *supra*, where the action was to recover for damage to property caused by the falling of a storehouse let by the defendant, the court said: "With his eyes wide open to the fact that the government would use his storehouse for heavy storage, he let them have it, knowing that it was unfit for such use, and he inserted no word of caution or restraint in the lease." In *Godley v. Hayrty*, 20 Penn. St. 387; s. c., 59 Am. Dec. 731, in an action for a personal injury received from the falling of the same storehouse, it was held that the owner of such a building is liable for injury sustained by a stranger in consequence of its grossly negligent and insufficient construction.

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WOODWARD, J., said : " If after it was finished he (the landlord) knew there were defects in it which unfitted it for the designed purpose, he should have stipulated in his lease against its being used for heavy storage. He omitted his duty in both respects. He did not build a strong storehouse, and he did not forbid heavy storage ; he must bear the consequences of his neglect."

In *Robbins v. Jones*, 15 C. B. (N. S.) 221 it was said by ERLE, C. J. : " A landlord who lets a house in a dangerous state is not liable to the tenants, customers or guests for accidents happening during the term ; for fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any." In *Mellen v. Morrill*, 126 Mass. 545, it was held that the owner of a building leased to a tenant who occupies it is not liable to a person, who in passing along a walk leading from the street to the building, for the purpose of transacting business with the tenant, is injured by falling down an embankment adjoining the walk, although the estate was in that condition prior to the letting. MORTON, J., said : " He (the defendant) had leased it to a tenant, and there is nothing to show that he retained any control over the walk, or any right to direct the purposes for which the premises should be used. The fact that the walk was in the same condition before the demise is not material. The defendant did not guarantee that the premises should be safe for all the uses to which the tenant might put them. The tenant alone had the right to determine the purposes for which he would use the premises. If he used them so as impliedly to invite people to visit them in the night, it was his duty to make them safe by a railing, or by a light, or other warning. It was not the duty of the landlord, and indeed he would not have the right without the consent of the tenant to do this." In *Nelson v. Liverpool Brewery Co.*, 2 Com. Pl. Div. 311 ; s. c., 21 Eng. R. 308, it was held that the landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or when he has been guilty of misfeasance, as for instance, in letting the premises in a ruinous condition ; in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy." That was a case where a portion of the building fell from its own weight in consequence of its ruinous condition, causing the injury complained of.

In this case then, under all the authorities, the liability to this

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plaintiff for the injuries sustained by him from the falling of the gallery can be imposed upon the defendant only by proving negligence on its part, and the burden of establishing the negligence rests upon the plaintiff. Now what are the facts? The defendant owned the premises known as Gilmore's Garden, and rented them to one Kelley for the purpose of giving therein a pedestrian exhibition for the space of ten days, for the rental of \$5,000. It was conceded upon the trial that one of the conditions of the demise was that the tenant might make any and all such changes in the interior of the building, in the appointments and fixtures thereof, as he might see fit, at his own expense, on condition that he should surrender the premises at the end of the term in the same state they were in at the beginning thereof. There was no agreement on the part of the landlord to make any changes or repairs. In the progress of the trial, subsequently to the concession referred to, which should be taken as true having been made for the purposes of the trial, a portion of a letter written by the defendant to Kelley was produced which specified that any alterations contemplated to the building must first be submitted to the president or vice-president of the defendant for approval, which being obtained, the alterations were to be made, and the property restored to its original condition, at the expense of the lessee. That clause in the letter, assuming that it was embodied in the lease between the parties, does not alter the effect of the concession, because the lessee was to determine what alterations he chose to make, and then had the right to make them, providing he could obtain the approval of one of the officers named. It does not appear that the approval of any proposed alteration was applied for or refused. So the case must be treated as if the tenant had the right to make any changes in the interior arrangements of the premises which he saw fit to make. The gallery which fell was erected at the westerly end of the building a short time prior to the demise, and was used on several occasions for Mardi Gras and other festivals. It was divided into boxes capable of holding from four to six persons, and each box was supplied with a table and chairs, and they were intended for occupation by persons who could be served with refreshments while witnessing the performances upon the main floor. The persons occupying the boxes during the festival performances were charged a much higher price than those who occupied other portions of the building. The gallery was built under the super-

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vision of an architect, and was suitable for the purpose for which it had been rented and for which it had been used. It was conceded upon the trial that it was built simply to accommodate a limited number, and not to be used for such an exhibition as a walking match; but there was no concession that it was not sufficiently strong to hold all the persons who could get into it, or that the defendant had any knowledge whatever of its weakness or defects. In the absence of proof it must be inferred that the tables and chairs were in the boxes at the time of the demise, and thus that the use for which the gallery was intended was apparent. There is no evidence that the defendant knew that the tables and chairs were to be removed, and that these boxes were to be filled with all the people who could crowd into them. Much less is there any proof that it knew or had reason to suppose that the same price would be charged for all persons entering the gallery as was charged for persons entering other parts of the building or that the boxes were to be filled with a noisy, boisterous crowd or people, stamping and keeping time to music. There is no evidence and no inference from any evidence in the case, that the defendant knew or had reason to suppose that the gallery would be used in such a way as to endanger its security. Nor was there any proof that any defect in the gallery was apparent or known to defendant, or that it could have been known by any examination that could have been reasonably expected or required or even made. The architect, called as a witness by the plaintiff, testified that the gallery was perfectly safe for a quiet crowd, but was not when crowded full of boisterous people, moving and stamping to the time of music, which would break down almost any structure. The sole proof by which it is sought to impose negligence upon the defendant is that the gallery, which was thus filled by people thus conducting, fell. There was no proof even that any of the timbers in the gallery were too small or weak and that they broke, or that they were not properly joined together and supported, or that the gallery was in any respect negligently constructed. The proof is simply that it fell, and the only apparent cause was the rhythmic tramp of the people who filled it, a cause which the landlord certainly was not bound to foresee and guard against. From such a state of things an inference of negligence is not justifiable. There was no proof that the gallery was not built as strong as any of the other galleries in the same building. Kelley, the lessee, knew the purpose for which the building was to

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be used, and the character of the exhibition which was to be given; and he could anticipate the crowd of persons who were to be called there. He was there and witnessed the manner in which the people conducted themselves; that they were noisy and boisterous and walking about, keeping time to the music. He could have placed supports and props under the gallery. That much he could have done, even without the consent of the landlord, as it would have been no alteration of the building. The landlord had no right to enter the building for the purpose of making any changes or alterations or to strengthen or support the galleries in any way. That duty rested entirely upon the lessee. I repeat that there is not the least evidence that the defendant knew that the building was unfit for the exhibition of a walking match, the character of which was not generally known and could not be presumed, or that the gallery would be unsafe for the persons who should enter it for the purpose of witnessing that match; and there can be no pretense that the building or the gallery was a nuisance. If it had been shown, or could reasonably be inferred, that the defendant knew how this gallery was to be used, and that it was dangerous and unfit for that use, and that it concealed its knowledge and did nothing to guard against the danger, no argument would be needed to establish its liability, as that would rest upon obvious principles of law universally applicable.

The case of *Swords v. Edgar*, 59 N. Y. 28; s. c., 17 Am. Rep. 295, somewhat relied upon by the counsel for the plaintiff, is one where liability was imposed upon the lessor of a public dock upon the ground that he had suffered a nuisance in his dock before the demise, and he was held liable on that ground. The decision was made against the dissent of three judges, and after overruling several cases decided in courts of high authority in this country and England, and the ground of nuisance is the only one upon which that decision can stand. There are other similar cases in the New England States and in England. A dock is regarded as a species of public highway, and the owner who suffers a nuisance to be created and continued upon his dock remains liable upon the ground of nuisance. The case of *Camp v. Wood*, 76 N. Y. 92; s. c., 33 Am. Rep. 283, does not sustain plaintiff's contention. In that case the landlord was found guilty of negligence for not keeping safe the portion of the building which remained in his possession and under his control. It was held that the lessor owed some duty to the persons who with

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his knowledge and consent came into his building, and might thus be exposed to the danger which caused the accident. The maxim *sic utere, etc.*, is sufficient to justify the decision of that case, which is based upon the same principle which imposes liability upon one who digs a hole upon his premises so near a highway that travellers are exposed to the danger of falling therein and being injured. The case of *Francis v. Cockrell, supra*, did not involve the liability of a lessor, and the question to be determined in this case was not under consideration there. The point decided there was that "a man who causes a building to be erected for viewing a public exhibition and admits persons on payment of money to a seat in the building, impliedly undertakes that due care has been exercised in the erection, and that the building is reasonably fit for the purpose." The liability was placed upon the ground that there was an implied contract between the defendant and his associates, and every person from whom they received an admission fee to the exhibition, and the distinction between the liability of those who gave the exhibition in that case and took pay for admission to the same, and the liability of a landlord during the term of his demise was clearly and properly stated, as shown by the abstract from one of the opinions hereinbefore given. In the case of *Grote v. Chester & Holyhead R. Co.*, 2 Exch. 251, the plaintiff suffered injury by the breaking down of the bridge of the defendant, while being carried over the same by another railroad company, and it was held that the defendant was liable. There was no question in that case of landlord and tenant. The defendant had not leased the bridge or its railroad to the other company, but for compensation paid to it, it permitted that company to carry its passengers over its road and over the bridge; and it was held, as it was in the case last cited, that the defendant was under a contract obligation to furnish a reasonably safe bridge, and it was made liable for a breach of the implied contract.

We are therefore of opinion that there was nothing in this case for submission to the jury, that the plaintiff was properly nonsuited, and the judgment below should be affirmed.

RUGER, C. J. (dissenting.) I differ with the majority of the court in respect to this case, with some reluctance, and should cheerfully yield to their larger experience and maturer judgment, were my own convictions on the subject less strong than they are.

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The differences which exist between us relate mainly to the principles of law applicable to the facts ; but as we also disagree in some minor particulars as to the meaning and effect of the evidence, I deem it proper first to state those facts, which I consider established, or fairly inferable from the proof.

The plaintiff, having been nonsuited, is of course entitled to the benefit of the most favorable construction of the evidence, and the determination of all doubtful inferences in his favor upon this appeal.

The case shows that he was injured on the evening of March 12, 1879, by the falling of a gallery, in Gilmore's Garden at New York. He was there as one of the spectators at a public exhibition called the International Walking Match, having paid the regular fee charged for admission to the entertainment. At the time of the accident, he was standing under the gallery which fell, it being at the time occupied by a portion of the audience. The plaintiff's right to be in the place where he was injured, and his freedom from negligence, are not questioned. The evidence tended to show that the gallery gave way in consequence of vibrations, produced by its occupants in tramping, to keep time to the music, and the insufficient capacity and strength of the structure to support the audience while thus engaged. The plaintiff's right to recover against somebody for the injuries sustained is not disputed, but it is urged that the liability rests upon the lessee, and not upon the owner of the building. The case shows that the defendant, on March 8, 1879, leased the building in question, a spacious structure, apparently capable of accommodating a multitude of people, and covering an entire square in the city of New York, to one Kelley, for ten days, at a rental of \$5,000. The premises were let for the express purpose of enabling the lessee to give the entertainment, which was being exhibited when the plaintiff received his injuries. So far as the case shows the building was in the same condition when leased as it was at the time of the accident, with the exception of a track and its railing which was constructed by the lessee for the use of the pedestrians. No provision was made in the lease for repairs by either party, and it appears thereby that any alteration by the tenant of the premises was prohibited, except upon the consent of the lessor first obtained, and upon the condition that they should be restored at the end of the term in the same state as when demised.

At the commencement of the trial it was conceded that the lessee

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had the right to make changes in the interior of the building, but subsequently the contract itself was produced and this concession was shown to be erroneous. The gallery was built on the westerly side of the building, extending a distance of about one hundred and twenty-four feet, and forming an extension of another gallery, constructed across the end of the building. It was, so far as appears, intended for use by spectators, and the extension was apparently built in the same way and supported in the same manner as the original gallery.

The extension was divided into twenty-four boxes or compartments with a passage-way running along the wall in the rear of the boxes and intended to facilitate access to them. The boxes were originally furnished with movable tables and chairs, and were designed to accommodate from four to six persons each, in witnessing entertainments, and partaking of refreshments, without leaving their seats, during the course of the performance.

It was conceded on the trial that at the time of the accident these tables and chairs had been removed, but by whom, or at what time, does not appear. There is no evidence that Kelley, the lessee, ever saw the chairs and tables, or knew how they were used, and no evidence from which a presumption would arise that he had done so. Even if it be conceded that he did know, it is not conceived how that fact can be material. The defendants certainly could not discharge the duty which they owed to the public, by simply notifying their lessee, that they did not consider the structure which they expressly let for the exhibition of a walking match, to be fit for that purpose.

Previous to the walking match this gallery had been used at the Arion and Mardi Gras festivals, by persons having charge of those entertainments, by leasing the boxes to individuals and parties desiring such accommodations, at prices exceeding those charged for admission to other parts of the building. The evidence tended to show that the supports of the gallery would have been sufficient to maintain the people who were admitted to it, on the night of the accident, had it not been for the stamping and boisterousness of the occupants. It was expressly conceded on the trial, by the defendants, that they did not build this gallery to be used for the purposes of such an exhibition as a walking match, but that it was intended simply for the accommodation of a limited number of people. It is not claimed that this intention and design was commu-

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nicated by the owner to the lessee or to any other person, or that any provision was inserted in the lease, referring to the gallery, but it is contended by the defendant that its division into boxes was sufficient notice to all persons of its limited capacity, and imposed upon them any risk resulting from the admission thereto, of a greater number of persons than it could safely hold, when it was also occupied by tables and chairs. Even if this circumstance be regarded as material, I do not think that it can be determined as a question of law. Taken in its most favorable aspect for the defendant it presented a question of fact merely for consideration by the jury. I do not think that the presence of boxes or compartments, in the gallery of a building intended to be used for public entertainments, necessarily affords notice of the limited strength and capacity of the structure wherein they are placed. It certainly furnishes no positive and definite indication of the number which it is designed to support, and the duty of communicating this information to the public rested primarily, I think, upon those who designed the structure and knew its limited capacity.

It is perhaps true that persons of great caution and prudence might infer from the division of the gallery into boxes that it was not designed to be filled to its utmost capacity, but to determine from this fact alone just how far it was safe to occupy it, and just when prudence would require access to it to be closed, is a question concerning which people of varying degrees of intelligence, caution and sagacity might well differ. It must be remembered that this gallery was obviously designed for the use of spectators, and was intended by the lessor to be thrown open for their accommodation at public entertainments. The responsibility of deciding just how many people could safely be admitted to it during the course of an exhibition cannot justly be imposed either upon a temporary lessee or its temporary occupants, whose knowledge of its insecurity could only arise from the inferences which they might draw from the fact of its division into compartments. This question was one peculiarly for the consideration of a jury and should not have been withdrawn from them.

The decree of liability which rests upon the owner of a building toward those who sustain injuries therein, on account of defects in its structure, varies according to the use for which it is designed. In order to exempt him from liability in the case of a building let for hire and designed for public entertainments, the use for which

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it is intended should be so obvious from the form of the structure or other causes that a variation from such use can easily be distinguished by observers and convey a clear idea of its restricted capacity. When a structure however is let by its owner for a particular public use, for which use he receives a compensation, there is always a warranty implied on his part that it is fit and adapted to the purpose for which it is let. There is generally no implied warranty upon the part of a lessor of dwellings or other private houses and buildings that they are fit and adequate to the purposes for which they are leased. *Jaffe v. Harteau*, 56 N. Y. 398; s. c., 15 Am. Rep. 458. But the rule is different with reference to erections in which public exhibitions and entertainments are designed to be given and for admission to which the lessors either directly or indirectly receive compensation. In such a case the lessor, by renting the premises for such purposes and receiving a compensation therefor, holds out to the public that the structure is fit and safe, for the purposes for which it is let, and owes a duty to those who attend such entertainment, requiring him to use all reasonable precautions to protect them from at least any danger arising from the known imperfections of the structure. *Swords v. Edgar*, 59 N. Y. 34; s. c., 17 Am. Rep. 295; *Camp v. Wood*, 76 N. Y. 92; s. c., 32 Am. Rep. 282; *Waggoner v. Jermaine*, 3 Denio, 306; *Francis v. Cockrell*, L. R., 5 Q. B. 184, 501; *Nulton v. Western R. Co.*, 15 N. Y. 444; *Thomas v. Winchester*, 6 N. Y. 397; s. c., 57 Am. Dec. 455; *Beck v. Carter*, 68 N. Y. 283; s. c., 23 Am. Rep. 175; *Grote v. C. & H. R. Co.*, 2 Exch. 251; *Campbell v. Portland Sugar Co.*, 62 Mo. 553; s. c., 16 Am. Rep. 503; *Wendell v. Baxter*, 12 Gray, 494.

If a structure adequate in all respects for the purpose for which it is apparently designed be delivered into the possession of a lessee, who is under an obligation to keep it in repair, and while thus in his possession an accident occurs by reason of its want of repair, the liability for damages thereby occasioned doubtless rests upon the tenant alone. *Moak's Underhill Torts*, 258; *Clancy v. Byrne*, 56 N. Y. 129; s. c., 15 Am. Rep. 391; *House v. Metcalf*, 27 Conn. 631. So too when the tenant devotes the premises to uses other than those for which they are let, and injuries occur in consequence of such an unauthorized use, the landlord would for that very reason be shielded from responsibility for the accident. *Moak's Underhill Torts*, 253; *Ryan v. Wilson*, 87 N. Y. 471; s. c., 41 Am. Rep. 384. But if any part of a structure, designed for occupation by the

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public, be so constructed that it cannot safely support all whom it has capacity to hold, it is obviously the duty of those authorizing its use by the public and knowing its insecurity, to take such precautions, either by giving notice, or limiting the number admitted, as will obviate any danger likely to arise from such defects. *Beck v. Carter*, 68 N. Y. 283; s. c., 23 Am. Rep. 175. In such a case the burden of proof rests upon the lessor to rebut the presumption of negligence, arising from the facts, by affirmative evidence showing the adoption of reasonable precautions to avoid accidents. *Mullen v. St. John*, 57 N. Y. 567; s. c., 15 Am. Rep. 530.

I think it entirely immaterial to inquire whether the person injured in this case had a right of action against the lessee, since in actions of tort all of the persons contributing to the injury are liable for the damages occasioned thereby. It is sufficient here to say that there was evidence upon which the jury might have found a breach of duty, on the part of the defendant, owing to the plaintiff, and from an omission to perform which he incurred injuries.

The theory now suggested, that the owner of a building designed to be let for the use of public entertainments has, upon letting the same to a temporary occupant, thereby imposed upon such occupant, and relieved himself from all liability to persons lawfully attending an exhibition therein, and receiving injuries through defects in its original structure, is a startling one, and is so opposed to what I believe to be settled law that I am unable to assent to it.

The principles upon which such owners have been held liable to the public, visiting their premises and receiving injuries thereon, through defects in their construction, have been frequently discussed and adjudged in the courts, in the cases cited as well as others, and a proper regard for the authorities, not only in our own court, but in those of other States and countries, seems to me to require the reversal of the judgment appealed from. This liability springs out of the obligation resting upon them to so guard their property, that persons entering upon it by their permission or invitation shall not be injured through any omission of theirs to take all reasonable and prudent precautions to insure the safety of such persons; and this liability becomes more imperative when the owner derives an income from such use of the property. I have supposed that it was an incontrovertible principle of law, when in the exercise of any business or calling, by whomsoever exercised or however carried on, which involves the safety, health or lives of the public,

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that the person pursuing such calling or business is held to the exercise of the highest degree of care in the prosecution thereof. Illustrations of this principle are found in the cases, relating to the compounder of drugs and medicines, the builder of houses or structures abutting upon streets or public highways, carriers of passengers, and manufacturers of tools or instruments to be used in a hazardous business. This liability does not rest upon the theory of an express contract between the owner and the person receiving the injuries, but is predicated upon the obligation which the law imposes upon all, to so keep and use their property that others using or entering upon it by their invitation shall not be injured by its improper condition or unfitness, and its inadequacy for the purpose to which it has been devoted.

Whether it be said that the circumstances raise an implied warranty upon the part of such owner toward those accepting his invitation, or impose a duty upon him with respect to the safety of the public, I regard as entirely immaterial. The nature of the respective obligations seems to be similar and possibly identical, but either in one form or the other, the liability of the owner seems to have been adjudicated in many cases. When the plaintiff has given evidence tending to show an omission, upon the part of the owners, to perform their duty, he has established a case sufficient to go to the jury, and if there are any circumstances, tending to excuse the apparent neglect of the owner, it is for him to show them.

Here the facts are expressly admitted that the owner, knowing the unfitness of the premises for the purpose, let them to be used for a walking match, and the accident occurred in consequence of their unfitness for the purpose. This apparently made a good *prima facie* case for the plaintiff under the authorities, and should have compelled the defendant to enter upon its defense.

I have been unable to see any material distinction between this case and that of *Swords v. Edgar*. The defendants in that case were the owners of a pier, kept for the accommodation of vessels receiving and discharging cargoes in the port of New York, and was leased by them to a steamship company from May 1, 1865, for a period of five years with a covenant from the lessees, to keep it in order and repair during the term. The pier was defective at the time it was let, and fell from that cause, while in the possession of the lessees on May 9, 1866, killing the plaintiff's intestate, who was then engaged in unloading a cargo from a vessel lawfully lying at

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the pier. There was evidence tending to show that the pier was too heavily loaded, at the time of the accident. It was held that the lessors were liable for the damage occasioned by its imperfections. It was said by Judge FOLGER in that case "that the defendants demised the premises to other parties, binding them in a covenant to keep the pier in good order and repair. The defendants were not in possession of the premises at the time of the accident. It is claimed that thereby the defendants are under no liability to the plaintiff. We have shown that this pier, so far as the intestate was concerned, was in the nature of a public place whereon he was lawfully engaged. We have shown that it was of such a nature that there was, as to him, a duty resting somewhere to keep this pier in reasonably sound and secure condition." The learned judge then continuing says, that primarily this duty rested upon the occupants of the pier, but further says that there may be a state of facts which will also cast a liability upon the lessors, and proceeds as follows: "When there has been a nuisance of continued existence upon demised premises, the lessor and lessee may both be liable for damages resulting therefrom. The lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it, and the lessor, if he first created it and then demises the premises with the nuisance upon them, and at the time of the damage resulting therefrom, is receiving a benefit therefrom by the way of rent or otherwise." It was also held that proof of misuse of the structure by the tenant in overloading it did not in that case relieve the lessors from liability. It has been said that this case is inapplicable to the one in hand because it proceeds upon the ground that the defect therein complained of constituted a nuisance, and that such an element is wanting in this case. It is not seen however wherein a defect in the structure of a pier, designed for the use of that class of the public engaged in commercial pursuits only, can be called a nuisance, and a similar defect in a church, theatre or other place of public amusement, which the public generally are invited to use, can be fittingly described by any other term. That case was in many important respects, and particularly in relation to the restricted class entitled to use the pier, the covenant to repair assumed by the lessee, the lapse of time after the letting, and the combination of natural decay with the original defect in construction producing the accident, a much stronger case for the defendant than the one now under consideration. Neither

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do I think the case of *Camp v. Wood* can be distinguished from this by any material circumstances. There the action was against an innkeeper who had let to others for a compensation a hall in the third story of his house for the purpose of enabling them to give a dancing entertainment, to which all persons were invited who were willing to pay the admission fee charged therefor. The plaintiff had paid his fee, and was injured by falling from a doorway, in the second story of the house, which it was charged had been negligently left open or unlocked by the owner. It was said by Judge ANDREWS in delivering the opinion of the court: "It is insisted that he (the defendant) owed no duty to the plaintiff which imposed upon him any obligation to make the premises safe, and to see, so far as he reasonably could, that the door was kept closed so as to prevent accident. This claim cannot, we think, be maintained. He let the premises for hire, and it is admitted by the pleadings that the public were invited to the hall with his consent and knowledge, whenever it was let for a public purpose. The plaintiff was rightfully there upon the invitation of the managers of the entertainment, implied from the public character of the assembly, their accepting the entrance fee paid, and his admission to the hall." "In this case the defendant, by letting the hall for public purposes, held out to the public that the hall was safe, and he was bound to exercise care to provide safe arrangements for the entrance and departure of people who came there upon his invitation." The main difference in these cases seems to be that here the defect existed in that part of the structure which was specifically let for a walking match, and in that, to a part of the structure which was not let, and as to which no contract could be implied, except one arising out of a duty imposed.

It could hardly be contended that such a difference favors the contention of the defendant here. The case of *Francis v. Cockrell* is a leading case in England and was thoroughly and exhaustively considered both by the Queen's Bench and in the Exchequer Chamber. The head-note of the report in the Exchequer Chamber reads as follows: "A man who causes a building to be erected for viewing a public exhibition, and admits persons on payment of money to a seat in the building, impliedly undertakes that due care has been exercised in the erection and that the building is reasonably fit for the purpose, and it is immaterial whether the money is to be appropriated to his own use or not." Referring to the case of

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Grote v. Chester & Holyhead Railway Co., 2 Exch. 251, which was an action by a passenger, on the Shrewsbury and Chester railroad, to recover damages for injuries received in consequence of the falling of a bridge, built by another railway company, and leased by them to the company upon whose cars the plaintiff was riding when the accident occurred, Chief Baron KELLEY says: "The question was whether the defendants, who had caused the bridge to be constructed by an engineer with whom they had entered into a contract, had not entered into an implied contract with everybody who had occasion lawfully to make use of the bridge and pass over that bridge, that it was reasonably fit for the purpose for which it was to be applied; that is, that it was safe and secure against ordinary risks and danger for any one to pass over it. It was held that the defendants had entered into such an implied contract and they were held liable for the consequences of the defect." This extract is preceded by the remark, "I cannot understand upon what imaginable ground it is to be supposed that there is not such an implied undertaking in every contract of this description." He further says: "First, there is the principle which I hold to be well established by all the authorities, that one who lets for hire, or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a stand from which to view a steeple chase, or a place to be sat in by anybody who is to witness a spectacle for a pecuniary consideration, does warrant and does impliedly contract that the article or thing is reasonably fit for the purpose to which it is to be applied." Baron MARTIN in the same case says: "I do not at all pretend to say whether the relation of the parties raised a contract, or a duty. It seems to me exactly the same thing; but I am of opinion when a man has erected a stand of this kind for profit, that he contracts impliedly with each individual who enters there and pays money to him for the entrance to it, that it is reasonably fit and proper for the purpose, or if you choose to put it in another form, that it is the duty of the person who so holds out a building of this sort, to have it in a fit and proper state for the safe reception of the persons who are admitted." It may be said with reference to this case that it is to be distinguished from the case at bar, by the fact that there the defendant was one of a committee who received directly the moneys paid for entrance by the spectators, although they acquired no interest therein, inasmuch as they were devoted by the committee to the use of the public in ex-

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penses for prizes, and other charges incurred in supporting the races. But that case was decided irrespective of any such distinction, and the *Grote* case was expressly approved of by most of the six judges delivering opinions. Analogous authorities on this subject will readily recur to the mind of every lawyer, and might be almost indefinitely cited; but sufficient have already been referred to, to explain the reasons which have controlled my judgment in the consideration of this case. My opinion of the case rests upon the undisputed facts, that the defendants let Gilmore's Garden for a walking match, a purpose for which they admitted it was not designed, and knowing its unfitness for that purpose, took no precautions other than those derivable from its general appearance, to warn either their lessee or the public of its want of fitness for such a purpose. The building was used by the lessees only for the purpose for which it was specifically let, and if there was any part of it, not adapted to such a use, it was the duty of the lessor to adopt effectual means to permit only such a use as was consistent with the safety of those attending the entertainment. It cannot be held, I think, as matter of law upon the proof in the case, that the defendants discharged the duty which they owed to the people who visited it to the lessors' profit, and by their consent, authority and invitation.

Judgment affirmed.

RAPALLO, ANDREWS and MILLER, JJ., concur with EARL, J.
DANFORTH and FINCH, JJ., concur with RUGER, C. J.

BARRY V. LAMBERT.

(23 N. Y. 300.)

Executor — evidence — trust.

A bond and mortgage were executed to defendant and M., as executors, for \$8,000. Of this amount \$8,000 belonged to the estate and the balance was lent to M. by the plaintiff. In an action to enforce a trust in the bond and mortgage for the plaintiff's loan, declarations of M., made soon after the loan, when she was feeble and expecting soon to die, to the effect that she had received the loan and that the plaintiff was to have an interest in the mortgage as security, and that she intended to execute a written acknowledgment to that effect, *held*, competent and constituting a valid and enforceable declaration of trust.

ACTION to enforce a trust in a mortgage. The opinion states the facts. The plaintiff had judgment below.

William E. Osborn, for appellant.

N. C. Moak, for respondent.

RUGER, C. J. The evidence in this case, outside of the admissions of the defendant's deceased co-executrix, tended strongly to show that the plaintiff, immediately previous to January 31, 1882, delivered to Maria Lambert, defendant's co-executrix, the sum of \$2,000 in bills of the denomination of \$100 each, and on that day the defendant, with his co-executrix of the estate of Thomas Lambert, loaned \$1,800 of this identical money, together with \$6,000 belonging to the estate and about \$200 belonging to Mrs. Lambert, in one aggregate sum of \$8,000 to Margaret Lawrence, taking back a bond and mortgage as security therefor to themselves as executors.

Outside of such declarations however the evidence was not entirely clear as to the particular understanding and agreement with reference to the disposition of these moneys entered into, between Mrs. Lambert and the plaintiff, when the money was delivered to her. This evidence was attempted to be supplied by proof of certain declarations, made by the deceased co-executrix, Maria Lambert, soon after the loan was made, in the presence of the plaintiff and other parties. Mrs. Lambert was at that time in feeble health and her early death was then anticipated. The declarations were offered to be proved by the witnesses who were present at the time they were made, but their admission was objected to by the defendant upon the ground that the declarations of one executor were not admissible as against his associate. The objection was overruled by the court and the evidence was received, to which ruling the defendant excepted. This exception presents the only serious question in the case.

The proof showed that Mrs. Lambert then made statements to the effect that she had received \$2,000 from the plaintiff, to make up the sum of \$8,000 loaned to Mrs. Lawrence, and that plaintiff was to have an interest in the mortgage taken as security for the loan and to receive her share of the interest as it was paid by the mortgagor; that she intended to make an acknowledgment to that

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effect, either by her will or in a separate instrument, before she died. She also stated that she expected to live until September. She in fact died in June soon after this conversation. These declarations were made by Mrs. Lambert in reply to a request on behalf of and in the presence of the plaintiff, that she should make such a declaration or acknowledgment as in the event of her death would render the interest of the plaintiff in the Lawrence mortgage secure to her. Mrs. Lambert then promised to attend to it as soon as she got a little stronger, but death intervened before she was able to perform her undertaking.

Assuming for the purpose of the argument that this evidence was admissible, there can be no doubt that these facts raised a valid implied trust *in invitum* (*Haddow v. Lundy*, 59 N. Y. 320; *Newton v. Porter*, 69 N. Y. 137), and that the express acknowledgment made by Mrs. Lambert operated as a full and perfect declaration of trust, sufficient within the authorities to charge the property then in the hands of the executors with the obligations of the trust.

While there is no proof of any express stipulation made between the parties at the time the money was delivered, that the security for the loan was to be taken in such form as to disclose the plaintiff's interest therein, yet an understanding to the effect that the plaintiff was the owner of one-fourth of the mortgage and of the interest accruing thereon must be implied from the absence of any agreement transferring the title of the money advanced to the executors. A trust by implication arises from the use of the money according to such understanding and agreement, and notwithstanding the security was taken in the name of the executors, equity will protect the interest of the beneficiary and follow the property in which the money was invested and impose a lien thereon in favor of the plaintiff to the extent of the sum belonging to her thus advanced and invested. *Price v. Blakemore*, 6 Beav. 507; *Perry Trusts*, § 842; *Matter of Frazer*, 92 N. Y. 240; *In re European Bank*, L. R., 5 Ch. App. 358; *Pennell v. Deffell*, 4 DeG., M. & G. (53 Eng. Ch.) 372.

No difficulty arises from the blending of the money of the estate with that of another person in the same loan, for the units of which it is composed being of equal value, it is clearly severable and distinguishable, and sufficient data are given to enable such severance to be made. The cases above cited show numerous instances in which such a separation has been decreed. Conceding for the

present that the admissions of Mrs. Lambert were incompetent to establish the facts upon which a trust *in invitum* can be decreed, it is nevertheless true that her statement also operated as a valid declaration of trust. It is well settled that a trust in personal property may be created by parol, and that no particular form of words is necessary for its creation, but the words or acts relied on to effect that object should be unequivocal and plainly imply that the party making them intended to divest himself of his interest in the property and to hold it thereafter for the use and benefit of another. *Hill Trusts*, 130; *Martin v. Funk*, 75 N. Y. 140; s. c., 31 Am. Rep. 446; *Young v. Young*, 80 N. Y. 438; *Willis v. Smyth*, 91 N. Y. 297; s. c., 36 Am. Rep. 634. This is all that is required to create a trust even as against the owner, and although he continues to retain possession of the property devoted to the trust. But when the legal title is in one party and the equitable ownership in another, it is only necessary for those facts to appear in order to constitute the holder a trustee for the benefit of the other. *Pye's case*, 18 Vesey, 140.

The evidence aside from the declarations in question tended strongly to establish these facts, and a strong presumption of an intended trust might fairly be implied from the nature and surroundings of the transaction.

By the will of Thomas Lambert, his wife, Maria Lambert, was given a life estate in all of his property, both real and personal, and his executors were directed to keep it invested during her life and pay to her the income thereof as long as she should live. The duties of their office required the executors to seek for advantageous investments and keep the moneys of the estate employed. It was entirely within their power, if it was not their duty, in case a profitable investment offered itself larger in amount than the available assets of the estate, to supplement them with other funds, if they could be legitimately obtained from other parties. These moneys were received by Mrs. Lambert under such a contingency, and she was engaged in the lawful and legitimate performance of her duties as an executrix when she received and invested them.

There is nothing in the office or obligations of executors that precludes them from acting as trustees upon other trusts and for other beneficiaries if the transaction is not inconsistent with the duties which they owe as executors. Neither will that fact subject property, thus held by them in trust, to the hazard of a loss on

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account of their dual character, so long as such property can be separated and distinguished from the funds held by them under their trust as executors.

The transaction between the plaintiff and Mrs. Lambert was, so far as here appears, a beneficial one for both of the funds intrusted to her, and in receiving the plaintiff's money she was acting in the performance of her legitimate duty as an executrix. It was clearly the duty of Mrs. Lambert when she used the plaintiff's money in acquiring this mortgage, to have caused a recognition of the plaintiff's interest to appear in the instrument itself (*Price v. Blakemore, supra*), and it was evidently her intention to repair this omission before her death by making such a declaration of trust as would protect the interest of the plaintiff, and the question in this case is whether legal proof has been given, from which a court of equity will find the existence of the trust.

Co-executors, however numerous, constitute an entity and are regarded in law as an individual person. Consequently the acts of any one of them in respect to the administration of estates are deemed to be the acts of all, for they have all a joint and entire authority over the whole property. *Williams Executors*, 810; *Wheeler v. Wheeler*, 9 Cow. 34. Thus one of two executors may assign a note belonging to the estate of the testator (*Wheeler v. Wheeler, supra*), or make sales and transfers of any personal property of the estate. *Bogert v. Hertell*, 4 Hill, 492. He may release or pay a debt, assent to a legacy, surrender a term or make an attornment without the consent or sanction of the others. *Williams Executors*, 812; *Jackson v. Shaffer*, 11 Johns. 513; *Douglass v. Satterlee*, 11 Johns. 16; *Murray v. Blatchford*, 1 Wend. 583; s. c., 19 Am. Dec. 537. It was said in *Wheeler v. Wheeler, supra*, "That if a man appoints several executors, they are esteemed in law as but one person representing the testator, and that acts done by any one of them which relate to the delivery, gift, sale or release of the testator's goods are deemed the acts of all." It would seem to follow from this principle that they have the power of joint and several agents of one principal and that any act done or performed by one within the scope and authority of his agency is a valid exercise of power and binds his associates.

It is quite true however that neither executors nor administrators, whether acting separately or jointly, have authority to create an original liability on the part of the estate or enter into an execu-

tory contract binding upon or enforceable against it. *McLaren v. McMartin*, 36 N. Y. 88; *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munro*, 47 N. Y. 366.

It would seem to follow as the result of the authorities, that the powers of executors, in the administration of estates confided to them, are commensurate with those expressly granted or necessarily implied, from the nature of the duties imposed upon them, and their power to bind their associates by their acts is limited only by the nature of the transactions they are called upon to perform. Thus having no power to bind the estate by a new contract, or to revive a demand which has once expired, neither their contracts nor admissions can have the effect of creating one or reviving the other; but having the original power to transfer the property of the estate for the purposes of their trust, any act, whether performed by one or all which has this effect, is within their authority, and binds the estate. It must be assumed however that such a transfer is made for a lawful purpose, and in form sufficient to operate as a transfer of property between individuals.

We are therefore of the opinion that the acknowledgments of Mrs. Lambert constituted a good declaration of trust, and that the making thereof was an act done in the performance of her duty, as an executrix of the estate of Thomas Lambert, which operated upon, and was enforceable against it. It would hardly be contended under the circumstances of this case, that a declaration made by Mrs. Lambert at the time these moneys were received by her, as to the purpose for which they were received, would have been incompetent to prove her trust character, even as against her co-executor; and it is difficult to see why a similar declaration made by her at a subsequent time would not be equally competent. Such a declaration could in no just sense be said to create any liability against the estate represented by her, or subject it to any action on account of the statement made, for such an action could arise only by a wrongful refusal on the part of the executors, to recognize the plaintiff's equitable rights of property. The arrangement shown by such a declaration, instead of creating a liability against the estate, would simply have the effect of protecting the party advancing the money, from an unjust claim of ownership on the part of the executors, by reason of the form in which the securities for the loan were taken.

The establishment of this trust works no injury to the estate, for

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the evidence aside from the declaration shows quite conclusively that the plaintiff's moneys to the extent of the lien claimed, and to which the estate had no title, went to make up the value of the property now in the possession of the defendant.

Some objections were made by the appellant to remarks that fell from the plaintiff while giving her evidence, that tended to show personal communications and transactions between herself and Mrs. Lambert. The witness was admonished by the court not to relate such transactions, and no ruling was made by the court, or exception taken by the appellant on the subject of such evidence on the trial. After the close of the trial the appellant asked to have these expressions struck out. This motion was denied by the court, and we think correctly disposed of.

The expressions referred to were inadvertently used by the witness, were ruled as incompetent by the court at the time they were made, and were not relied upon in deciding the case.

The conclusion arrived at on the main point of the case renders it unnecessary for us to consider the question as to the admissibility of the declarations of one executor against his associate when offered as evidence to prove the facts stated in such declarations.

The judgment should be affirmed.

Judgment affirmed.

All concur.

DEBEVOISE V. NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

(2d N. Y. 377.)

Statute — extra-territorial force.

An action of damages for death caused by negligence in another State cannot be maintained in this State without proof of the existence of a like statute in that State.*

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The defendant had judgment below.

* See *Herrick v. Minneapolis, etc., Ry. Co.* (31 Minn. 11), 47 Am Rep. 771; *Boyce v. Wabash Ry. Co.*, *post*.

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John W. Lyon, for appellant.

Louis E. Carr, for respondent.

EARL, J. This action was brought to recover damages for negligently causing the death of James Debevoise, a brakeman in the service of the defendant. It was alleged in the complaint, and proved by uncontradicted evidence, upon the trial, that the death was caused at Penn Horn in the State of New Jersey. After the close of the plaintiff's evidence, and again at the close of the entire evidence, the defendant moved that the plaintiff be nonsuited upon several grounds, the first of which is, "that it appears by the testimony that the death occurred in the State of New Jersey, and therefore that the statute of the State of New York under which this action was brought does not apply."

This right of action depends entirely upon statute law. Such a right of action did not exist at common law. There was no proof that the common law of New Jersey had been changed or that any statute existed there authorizing an action to be maintained to recover damages against one who has negligently caused the death of another. Our statute has no extra-territorial effect, and we cannot infer or presume that a similar statute exists in New Jersey. There was therefore a vital defect in the plaintiff's proof, which was plainly pointed out, and the nonsuit was properly granted. *Whitford v. Panama R. Co.*, 23 N. Y. 465; *McDonald v. Mallory*, 77 N. Y. 546; s. c., 33 Am. Rep. 664; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; s. c., 38 Am. Rep. 491.

It was not necessary for the defendant to allege in its answer that the death occurred in New Jersey, and that there was no statute there authorizing the maintenance of this action. The plaintiff was bound to show, both by his complaint and proofs, that he had the right upon the law and the facts to maintain his action; and this is a case therefore of the failure of facts to constitute a cause of action, both in the complaint and the proofs, and the defendant could take advantage thereof at the trial.

We are therefore of the opinion that the judgment should be affirmed, with costs.

Judgment affirmed.

All concur.

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PARKER V. STROUD.

(98 N. Y. 372.)

Negotiable instrument — note on demand — liability of indorser.

The indorser of a note payable on demand at a specified place is not liable until formal demand at that place; such demand may be made at any time; and the statute of limitation does not begin to run until such demand.

ACTION on note. The opinion states the case. The defendant had judgment below.

Earl L. Stimson, for appellant.

M. E. Barlow, for respondent.

RUGER, C. J. The sole defense in this action is the statute of limitations, and it therefore becomes necessary to determine when it commenced to run upon the cause, stated in the complaint. Section 74 of the Code of Procedure being the law in force at the time the obligation in suit was given, reads as follows: "Civil actions can only be commenced within the periods prescribed in this title *after the cause of action shall have accrued*, except," etc. Section 91, subdivision 1, then prescribes the following limitations: "Within six years, an action upon a contract, obligation or liability, express or implied," excepting, etc. These sections contain the limitations applicable to this cause of action, and by determining the time when a right to sue accrued to the holder, against the indorser, upon the demand in suit, we shall have the solution of the question raised by this appeal.

The action is brought against the defendants, as representatives of the estate of the indorser, upon a promissory note made by one Mason, reading as follows:

"\$1,100.

CANASTOTA, N. Y., Nov. 23, 1870.

"On demand I promise to pay to the order of Charles Stroud Eleven Hundred Dollars at the Importers and Traders' National Bank, New York City, value received with use.

"V. W. MASON."

Indorsed: "CHARLES STROUD."

Payment of the note was demanded, and refused at the bank named therein, in February, 1880, and due notice of non-payment was given to the indorser. The action was commenced in March, 1881.

The plain import of the indorser's contract in this case is, that the maker of the note will pay the same at a certain time and place; and if it remains unpaid after demand made at such time and place he will pay it upon notice of its nonpayment. *Berkshire Bank v. Jones*, 6 Mass. 524. It is very clear that no cause of action arises against the indorser, upon such a contract, until after a demand made at the time and place stipulated, and the neglect of the maker to pay the same. The undertaking of the indorser is conditional, and an omission by the holder to comply with the condition imposed, by the contract, under which the indorser's obligation arises, operates to discharge him altogether from liability. Story Prom. Notes, § 230; *Bank of U. S. v. Smith*, 11 Wheat. 171.

A demand of payment, at the place named, is an essential part of the contract so far as the indorser is concerned, and no right of action accrues to the holder until "after demand has been made in strict compliance with the terms of the contract and due notice given of the default." *Wolcott v. Van Santvoord*, 17 Johns. 248; *Woodworth v. Bank of America*, 19 Johns. 392; s. c., 10 Am. Dec. 239; *Ferner v. Williams*, 37 Barb. 10. This is said to be otherwise as to the maker, for he is under a general obligation to pay the debt, and even a tender of payment by him does not discharge his obligation, although he has contracted to pay the money at a certain time and place. This has been held, so far as the maker is concerned, to have reference only to the mode of performing the contract, and the neglect of the holder, to demand payment at the time and place, does not discharge the debt as to the maker, but simply subjects the holder to the hazard of being defeated as to costs, upon proof by the maker of readiness to pay at the time and place mentioned. Authorities above cited. A question however which has been more seriously discussed in the cases arises over the liability of an indorser, upon a note payable on demand, and bearing interest, with respect to the time, when it shall be considered due. Since the case of *Merritt v. Todd*, 23 N. Y. 28, no determination contrary to the principles there laid down has been made in this State, and although that decision has been somewhat criticised in later cases, it has now been acquiesced in too long,

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as the law of the land, to be open to question or dispute. The case was expressly followed in *Pardee v. Fish*, 60 N. Y. 265; s. c., 19 Am. Rep. 176, and was conceded to be the law, upon the same facts, in the later cases in this court, in which it has been referred to. *Herrick v. Woolverton*, 41 N. Y. 581; s. c., 1 Am. Rep. 461; *Wheeler v. Warner*, 47 N. Y. 519; *Crim v. Starkweather*, 88 N. Y. 339; s. c., 42 Am. Rep. 325.

The rule laid down in *Merritt v. Todd* is stated in the head-note as follows: "A promissory note payable on demand, with interest, is a continuing security, an indorser remains liable until an actual demand, and the holder is not chargeable with neglect for omitting to make such demand within any particular time." The facts of this case bring it directly within the rule thus laid down.

Any question which may arise, as to the liability of an indorser, upon a promissory note payable with interest, on demand, upon which the statute has been allowed to run, by its holder in favor of the maker, is unnecessary to consider in this case, as the note here has been kept alive against the maker by the payment of interest, and the indorser has always had it in his power to end his liability by taking up, and enforcing it against the maker.

While the long delay in this case presents one of extreme indulgence on the part of the holder, to the maker, and to appears susceptible of unfair operation against an indorser, yet it comes clearly within the principle decided in *Merritt v. Todd*, and consistency as well as certainty in legal rules constrains us to adhere to the rule there laid down.

It was said in the court below, and has been urged in the argument before us, that certain letters addressed by the holder to the maker, requesting payment, operated as a sufficient demand, to cause the statute to commence to run against the note, in favor of the indorser. The authorities hereinbefore cited seem to show that no such request or demand is sufficient to support a cause of action against the indorser of a note payable at a particular time and place; and even a letter from the maker stating his inability to make payment, does not excuse the necessity of a formal demand. *Pierce v. Whitney*, 29 Me. 188. Indeed such a demand is ineffectual for any purpose, except perhaps from the reason assigned, a waiver of a more formal demand may be implied as against the person upon whom it is made. *Lockwood v. Crawford*, 16 Conn. 361; *King v. Crowell*, 61 Me. 244.

The theory upon which a demand, required either by the terms of a contract, or the rules of law, is made necessary, is to enable the party liable to perform, an opportunity to protect himself, by performance, from suit and costs. If upon a demand by letter the maker remain silent, or having the means to perform, awaits a demand accompanied by an authority to accept performance, it cannot be said that he has committed a breach of his contract. 1 Pars. on Bills and Notes, 372. It is essential to the validity of a demand, that it shall be made by a person authorized to receive payment, and deliver the instrument upon which it is founded, and the person upon whom it is made, must then be afforded an opportunity, by immediate payment or performance, to protect himself from the consequences of a breach of contract. 1 Dan. Neg. Inst. 518; *Tredick v. Wendell*, 1 N. H. 80; *Doubleday v. Kress*, 50 N. Y. 410; s. c., 10 Am. Rep. 502. The obligation to make a demand implies an opportunity afforded for performance, and there must be a person present to receive payment, as well as one from whom payment is demanded, in order to establish a breach of contract. Not only does the nature of the act lead to the conclusion that a demand by letter is insufficient to charge the indorser, but the principles laid down by elementary writers, as well as those adjudged in numerous reported cases, are uniform to the same effect. 3 Kent Com. (11th ed.) 128; 1 Dan. Neg. Inst. 518; Chitty Bills (12th Am. ed.) 415; 1 Pars. Bills and Notes, 371; *Burnes v. Vaughan*, 6 R. I. 259; *Stuckert v. Anderson*, 3 Whart. 116; *Gillispie v. Hanahan*, 4 McCord, 503; *Hartford Bank v. Green*, 11 Iowa, 476.

In accordance with these authorities, we must hold that the request, contained in the letters referred to, did not operate as such a demand as the law requires to charge an indorser. It has of course been frequently held that the liability of the maker upon such a note rests upon different principles from that of an indorser and that as to him no demand is necessary in order to entitle the holder to bring suit upon it. *Wheeler v. Warner*, 47 N. Y. 519; s. c., 7 Am. Rep. 478; *Honland v. Edmonds*, 24 N. Y. 307. This doctrine was recognized in *Merritt v. Tuohy*, and it has been held in other cases that the dishonor of a demand note, as against its transferee, may be presumed from the lapse of time occurring between its date and transfer, so as to let in an equitable defense, existing in favor of the maker against its payee; *Herrick v. Woolverton*, 41 N. Y. 581; s. c., 1 Am. Rep. 461, but these cases do not

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affect the principle upon which the liability of an indorser upon a similar note is made by the cases to depend.

It is also argued by the appellants that the reception by the holder of payments of interest by the maker extended the time of payment of the note, and thus discharged the indorser.

It is quite obvious that such acts did not extend the time of payment on the note, and constituted no obstacle to the indorser's right to take it up and enforce its collection against the maker.

It follows from these views that the judgments of the courts below should be reversed and a new trial ordered with costs to abide the event.

Judgments reversed.

All concur.

LORD V. TIFFANY.

(66 N. Y. 412.)

Trespass — actions for joint — satisfaction.

In case of a joint trespass there may be separate actions, and satisfaction of the separate costs, but only one satisfaction of damages.

ACTION to ascertain amount due on judgments, and to restrain collection after payment of such amount. The opinion states the facts. The plaintiff had judgment below.

W. M. Tiffany, appellant, in person.

Geo. H. Forster, for respondent.

DANFORTH, J. The defendant, Tiffany, commenced two actions, one against Hezekiah B. Lord, alleging in substance that on the 31st day of January, 1870, Lord, in behalf of himself and one Josiah St. John, set in motion in the Marine Court, attachment proceedings for the collection of a debt of \$60, by virtue of which the canal boat "Stab Merry" and its tackle, etc., his property, were taken from him, the other against Josiah St. John, alleging similar proceedings in favor of himself and one Hezekiah B. Lord, for the collection of a debt of \$60, with like consequences. It is not denied that there was but one debt, one canal boat with

its tackle, one defendant, and it is found by the trial court upon evidence quite sufficient to warrant it, that Lord and St. John were at these times partners, and that the acts complained of in the two suits occurred while they were making efforts, as they supposed, in a legal manner, to collect that debt. Tiffany succeeded however in each suit, recovering in the first, damage for conversion in taking the boat under the attachment, which with costs amounted to \$2,465.28, and in the other, including costs \$2,824.71, for conversion in selling the boat on execution, the property in the mean time not having been returned to Tiffany, nor the first conversion cured. The attachment and execution were proceedings in the same action, and the two conversions were part of the same transaction in which both St. John and Lord were engaged. Each judgment was appealed from, and affirmed by the General Term (5 Lans. 153), and the Commission of Appeals (65 N. Y. 310, 314), and in due course, Tiffany had judgment against Lord for costs of appeal to the General Term, July 11, 1872, for costs in Court of Appeals May 19, 1875, against St. John for costs in the General Term July 5, 1871, and in the Court of Appeals May 19, 1875. He also sued upon the undertakings given on these various appeals, and recovered judgment against Banks and Ellis, sureties, on Lord's appeal to the General Term November 29, 1875, for \$3,392.82, against Walsh and Ellis, sureties, on his appeal to the Court of Appeals January 31, 1876, for \$3,610.90, against Gilmartin and Smith, sureties, on St. John's appeal to the General Term November 29, 1875, for \$4,118.17, and against the same, on his appeal to the Court of Appeals December 31, 1875, for \$4,167.18.

In March, 1876 (as the trial court found), Smith, one of the above-named sureties, paid Tiffany on the judgments against him the sum of \$4,077.90, at the same time agreeing that this payment should not affect the right of Tiffany to collect all his judgments against the other parties. Tiffany also agreed to, and did release Smith separately from the judgments against him, and Smith agreed to and did assign to Tiffany all his rights or claim against St. John or Gilmartin by reason of such payment. The trial court fixed the amount, which with that paid by Smith, would satisfy the damages in one and the costs in all the actions, and directed judgment that upon payment of that amount, the judgments against Lord and the sureties upon the undertakings given by him be discharged, that Tiffany be enjoined and restrained from collecting any more thereon,

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and that Gilmartin as surety with Smith have judgment releasing him from one-half of the judgment and restraining the collection of more than one-half from him. Judgment was entered accordingly.

The effect of this payment is the important question in dispute. We concur however with the court below in the opinion that the appellant's contention in regard to it is altogether wrong. A variety of cases has been cited by him, but they are all within the rule which requires each surety to contribute to the debt, whether they are bound by separate instruments or not, and whether the number is more or less, for the maxim that equality is equity furnishes the principle which operates in either case. The creditor therefore who can call upon all is not at liberty to fix one with payment of the whole debt. This is precisely what the appellant seeks to do in this case. One surety has paid an amount nearly equal to the whole judgment against him and his co-surety, and enough with the sum tendered to make the appellant good against all loss or damage, and costs, by reason of the acts of St. John and Lord, the principals, and the appellant has received the money. He says however that the person paying it, paid it not under coercion and in obedience to the judgment, but to buy his peace and be relieved from further litigation. The agreement between Tiffany and Smith will permit that conclusion. Yet Smith would not have paid it, nor could he have been subjected to litigation if he had not assumed the character of surety. When he did that, he became subject to liability and restraints in his conduct toward his co-surety, not merely by contract, but through that general equity to which we have referred as enjoining equality of burden and benefit.

It is a well-settled rule that a surety is entitled to the benefit of any security taken by the creditor, and it applies also to money received by him from a person who would not have paid it, or who could not have been compelled to pay it if he had not sustained that relation. Here the contract between Tiffany and Smith recites the existence of that relation, describes the judgments already referred to, and states as the ground of contention between the parties, a difference of opinion as to the amount which Tiffany is entitled to recover — whether the larger judgment or both judgments. The subject of the transaction was the liability of Smith as surety, and because he was surety he paid the money. It was not in his power to restrain the application which the law made with or with-

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out his assent. As to it he had no option, and over it he could have no control. But again by the same instrument Smith assigned to Tiffany all claims against St. John (his principal) and Gilmartin (his co-surety) which he might have by reason of that payment. He could have none, except it applied for their benefit. As surety Smith was bound to pay. The amount paid was not in excess of his undertaking, and neither directly nor indirectly, by his own act or in conjunction with the creditor, could he keep the judgment alive in order to coerce payment from his co-surety, or in any other way qualify the effect of his payment to the prejudice of the other surety. It is true the actions against Lord and St. John were for trespasses, but that cannot alter the application of these rules. There was, in fact, a single transaction, but two actors. Each was liable. Tiffany had the option to sue both in one action, or each separately. He chose to have as many actions as there were wrong-doers, but he could not multiply his damages. Although he had a verdict and judgment in each action, he can have but one satisfaction, and that will be operative as to both. *Livingston v. Bishop*, 1 Johns. 289; s. c., 3 Am. Dec. 330; *Creed v. Hartmann*, 29 N. Y. 591. He may have however the costs in all the actions. But when these full sums are paid, neither the principal debtor nor the sureties should be further vexed.

It is argued that the court below took no account of the sum of \$99.60 costs, it is said, of dismissal of one appeal. It does not appear that the intention of the trial court was called to it in any way, and if there be an error in that respect, the means are not before us for its correction. A case was made for equitable relief. The plaintiff in these various judgments insisted upon payment according to their terms, refusing even to apply upon them the money received from Smith. The parties interested were numerous, their rights not the same, and while it is possible the questions might have been disposed of upon motion, it was at least discretionary with the Supreme Court to entertain the action, and their determination is not the subject of review. But we think a court of equity cannot greatly err in putting an end to unnecessary suits, even against trespassers or their sureties, when its interference is invoked with an offer of full satisfaction, and the circumstances are such that the remedy at law is either inadequate or doubtful; more especially is this so when, as condition of relief, it requires payment to the other party of all damages sustained by him, with

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costs and increase, thus ending litigation, and at the same time exacting justice. Such, as we understand the record, is the case here.

We find no question which was left unexamined by the learned judges at Special or General terms, nor any point made by the appellant, which makes it necessary to add more to the opinions on which their decision stands.

We think the appeal wholly fails, and that the judgment of the court below should be affirmed.

Judgment affirmed.

All concur.

ACKLEY V. PARMENTER.

(98 N. Y. 425.)

Statute of frauds — debtor placing property in hands of another.

The plaintiff in foreclosure adjourned the sale at the request of a third person, who represented that he had received property from the mortgagor to enable him to pay, or to indemnify him for paying the debt, and who orally promised to pay the debt or to bid off the property at the adjourned day for enough to pay the debt. *Held*, that, the promise was void under the statute of frauds, for want of consideration.*

THE opinion states the case. The defendant had judgment below.

James Lansing, for appellant.

R. A. Parmenter, for respondent.

RAPALLO, J. The question on this appeal is whether the trial court erred in dismissing the complaint on the ground that the undertaking of the defendant was void under the statute of frauds.

The complaint averred, in substance, that on the 23 of May, 1876, the plaintiff, as executor of Philander Ackley, deceased, obtained a judgment for the foreclosure of a mortgage made to his testator

* See *Muller v. Riviere* (59 Tex. 640), 46 Am. Rep. 291, and note, 296; *Mason v. Wilson* (84 N. C. 51), 37 Am. Rep. 612.

by Robert F. Silliman, on certain lands in Saratoga county, to secure an indebtedness of Silliman, of which there was then due \$2,675.84; that under that judgment the mortgaged premises were advertised for sale, and that at the time and place appointed for such sale the referee attended for the purpose of making it, and the plaintiff and defendant were also present. Then follows the allegation of the contract upon which the defendant's liability is claimed to have arisen, in the following words, viz.: That the defendant "then and there stated to the plaintiff that if he, said plaintiff, would consent to the adjournment of said sale for ten days he, said defendant, would then attend and bid off the property at the sale, and pay the plaintiff the full amount of his claim thereon; that the said Robert F. Silliman had placed in his, defendant's, hands certain ferry stock, which would protect him, defendant, in his said undertaking." The complaint then goes on to aver that thereupon the plaintiff, relying upon the defendant's promise and believing his statement, did adjourn the sale for ten days; but the defendant refused to perform his promise or to pay to the plaintiff the amount of his claim, but bid at the sale only \$1,820, at which sum the mortgaged premises were struck off to him, and he refused to bid or pay more; that afterward the plaintiff entered a judgment against Silliman for the deficiency, amounting to \$980; that Silliman was insolvent, and nothing has been collected on the judgment.

On the trial the plaintiff's proof of the agreement alleged consisted of his own testimony and that of his debtor, Silliman. The plaintiff testified that the defendant attended the sale and wished plaintiff to adjourn it for ten days, saying that Silliman had placed in his hands ferry stock to bid off the property and pay plaintiff his full claim if plaintiff would postpone the sale for ten days, to which proposition plaintiff acceded. Silliman testified that what defendant said was that if plaintiff would adjourn the sale for ten days he would pay the plaintiff the full amount of his claim, and that plaintiff consented to the proposition; that the defendant further stated to plaintiff that he, Silliman, had put ferry stock into his hands for the purpose of paying for the property, and he would be prepared in the course of about ten days to pay for it.

When recalled, after the defendant's testimony had been closed, the plaintiff repeated his statement of the defendant's promise to bid off the property and pay the plaintiff's claim, adding that his

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language in respect to the ferry stock was that Silliman had placed in his hands ferry stock which would protect him.

The defendant denied ever having made the promise attributed to him, and introduced evidence which cast serious doubt upon the facts testified to by Silliman and the plaintiff. But instead of going to the jury on the questions of fact, the defendant's counsel, at the close of the testimony, moved to dismiss the complaint, on the ground, among others, that the alleged promise of the defendant, not being in writing, was void under the statute of frauds. The court granted the motion, and that ruling is the matter now under review.

The question at issue is ably discussed in the opinions delivered at General Term, viz., the prevailing opinion of LEARNED, P. J., and the dissenting opinion of POTTER, J. After a careful consideration of both of these opinions, and after reading all the testimony in the case, we have arrived at the following conclusions:

First. That the defendant's undertaking, as shown by the evidence on the part of the plaintiff, is capable of but two constructions—one, that in consideration of the adjournment of the sale, at the defendant's request, the defendant would pay the amount due to plaintiff from Silliman; the other, that he would bid off the property at the adjourned sale for a sum sufficient to enable the plaintiff to realize his claim out of the proceeds. We regard both of these undertakings as covered by the statute of frauds, unless the defendant, before making the promise, had so dealt as to make Silliman's debt his own, or had incurred a duty to pay the amount owing from Silliman to the plaintiff. In either of the cases supposed, the defendant's undertaking would not have been within the statute of frauds, for the reason that it would have been to discharge an obligation resting upon himself, and not simply to answer for the default of another.

Second. The inquiry is thus reduced to the question whether the statements of the defendant to the plaintiff, as testified to by the latter and his witness, even giving to them the force of an estoppel, showed an existing obligation or a duty on the part of the defendant to pay the debt due from Silliman to the plaintiff. One version of these statements is that Silliman had placed ferry stock in the hands of the defendant to bid off the property, and pay the plaintiff his full claim. The other is that Silliman had placed in the hands of the defendant ferry stock which would protect him. An

examination of the entire testimony in the case has satisfied us that on one or the other of these versions the plaintiff's case must rest. The one last mentioned is that which the plaintiff sets up in his complaint, but as evidence was admitted, without objection, of both of them, we will consider both.

The representation alleged in the complaint is clearly insufficient to disclose any existing duty on the part of the defendant to pay plaintiff's claim. It shows only an indemnity. The obligation, if any, arose from the subsequent promise, and that standing alone was void, because the debt was Silliman's and the promise was not in writing. It is not even alleged that defendant promised to Silliman to pay his debt to the plaintiff. The mere receipt from Silliman of indemnity before the promise to plaintiff was made, created no obligation. The defendant might have rejected the indemnity and never made the promise. The plaintiff could not have compelled him to make it, and acquired no rights by his being protected in case he should do so.

The other version of the representation is equally insufficient to overcome the effect of the statute of frauds. It is, that Silliman had placed ferry stock in the defendant's hands for the purpose of bidding off the property, and paying the plaintiff's claim. This is the branch of the case principally discussed in the opinions at General Term. POTTER, J., in his dissenting opinion, takes the ground, among others, that it is deducible from the evidence that the defendant, in consideration of the transfer of the ferry stock to him by Silliman, absolutely promised to pay the plaintiff's debt.

If the evidence were such as to authorize a finding that the defendant had himself become indebted for the stock, or that the stock had been transferred to him for his own benefit, and in consideration of such transfer, he absolutely promised to pay to the plaintiff the amount of his claim, we should agree with the learned judge in his conclusion.

If Silliman had sold the stock to the defendant under an agreement with him that the consideration money should be paid to the plaintiff on his mortgage, or to state the proposition more broadly, if the stock had been transferred to the defendant in consideration of an agreement that he should make compensation for some benefit accruing to himself from such transfer by paying the plaintiff's claim, the case would fall within the principle of the cases cited by the learned judge. But there was no evidence of any such

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facts nor can they be inferred from the alleged statements or admissions of the defendant, as to which it is claimed that he is estopped. The alleged undertaking of the defendant appears throughout to have been to pay for account of Silliman, and there is nothing to indicate that the defendant had made the debt his own, otherwise than by his alleged promise to the plaintiff. The admission or representation as set forth in the complaint, and as testified to by Silliman, was that he had placed ferry stock in defendant's hands which would protect him in his undertaking. The other version is that Silliman had placed ferry stock in defendant's hands for the purpose of bidding in the property, and paying the plaintiff's claim. There was no representation or evidence that the stock had been placed there for any other purpose, or that it had been placed in defendant's hands for his own benefit in consideration of a promise to Silliman to pay plaintiff's claim out of his own funds.

The prevailing opinion holds that the most favorable construction which can be put upon the evidence on the part of the plaintiff is, that supposing the representation testified to had been true, and that the defendant had, in fact, received the stock for the purpose of bidding in the property and paying the plaintiff's claim, that would imply at most that he was to sell or convert the stock, and with the avails pay the plaintiff's claim.

After full consideration we have come to the conclusion that this is the correct view. The case thus regarded is directly in line with the decision of this court in *Belknap v. Bender*, 75 N. Y. 446; s. c., 31 Am. Rep. 476, which holds in substance that where the obligation of an assignee, under his arrangement with his assignor, is to pay a creditor of the latter out of the proceeds of the assigned property, the duty to pay does not arise until such proceeds have been realized, and a promise to the creditor before that time to pay his claim is within the statute of frauds.

The principle is, that the duty to pay makes the assignee a principal, and the promise, founded upon that duty, an original undertaking.

In the case before us the strongest statement of the alleged admission or representation of the defendant is, that Silliman had placed in his hands ferry stock to purchase the property and pay the plaintiff's claim. He was to pay with the stock placed in his hands. It is obvious that he could not pay for the property or pay the plaintiff's claim, in stock, and that the proceeds must be real-

ized. Hence the request for delay. Both the plaintiff and Silliman testify that the request was put upon the ground that ten days were required to enable the defendant to get ready. There is nothing in the evidence indicating that the defendant undertook to become himself the purchaser of the stock.

The necessary implication from the evidence, according to all the theories which have been advanced, is that if the defendant absolutely promised to the plaintiff to pay the plaintiff's claim against Silliman out of his own funds, he did so looking to the stock placed by Silliman in his hands merely for his own protection or indemnity, as alleged in the complaint. If on the other hand, he received the stock for the purpose of applying it to the purchase of the property, or the payment of Silliman's debt, the plaintiff's undertaking was to pay out of the proceeds, and his duty to pay would not arise until he had converted the stock into money. Consequently at the time of the alleged promise he was under no present duty to pay, and the promise, though founded on a good consideration (viz., the adjournment of the sale) was nevertheless an undertaking to pay the debt of another, and was valid under the statute of frauds.

In such a case it is not sufficient to show that there was a consideration for the promise. There must be a consideration in every case, even if the promise is in writing. But a consideration is not of itself sufficient to supply the place of a writing where one is necessary. To take the case out of the statute there must be a consideration moving to the promisor, either from the creditor or the debtor. It must be beneficial to the promisor. That is the feature which imparts to the promise the character of an original undertaking. *Mallory v. Gillett*, 21 N. Y. 412. Forbearance or indulgence to the debtor, or the surrender to him by the creditor of a security for the debt, even at the request of the promisor, will not support a verbal promise by a third party to pay the debt. *Mallory v. Gillett*, *supra*. There does not appear in this case to have been any new consideration passing between the newly-contracting parties. All that the plaintiff (the creditor) did was to forbear pressing the sale of the debtor's property and to give further time, at defendant's request, and all that the debtor did was to place property in the defendant's hands to enable him to raise the means of paying the debt, or to indemnify him if he should choose to pay it out of his own means. There is nothing to show that this was beneficial to the plaintiff in any way, or that it had become his duty to pay the debt.

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Belknap v. Bender, 75 N. Y. 446 ; s. c., 31 Am. Rep. 476 ; *Jackson v. Rayner*, 12 Johns. 290, is very nearly in point, and although cited with some hesitation in *Mallory v. Gillett*, seems to be in accord with the later case of *Belknap v. Bender*.

We have treated the case on the theory that the alleged representation of the defendant, that stock had been placed in his hands, by Silliman for the purposes stated, estopped him, under the circumstances, from denying the fact, and we have not therefore diverted to the evidence on the part of the defendant, claimed to be conclusive, that the stock which he held was his own, and that Silliman had no interest in it. But we do not decide that an oral promise to pay the debt of another can be made valid by being accompanied by oral admissions of facts, which if true would convert the promise into an original undertaking. Such admission would doubtless be competent evidence of the facts, but whether this is a proper case for the application of the doctrine of estoppel *in pais* presents a different question, upon which we do not now pass.

The judgment should be affirmed.

Judgment affirmed.

All concur.

MAYOR, ETC., v. KELLY.

(36 N. Y. 467.)

Surety — for faithful performance — new duties.

The defendant became surety for the faithful performance of a book-keeper's duties in the department of docks in the city of New York. The book-keeper was required also to assist the treasurer in receiving and depositing the department funds, and he embezzled the same by means of false entries or omissions to make entries. It was conceded that the additional duties did not hinder his faithful performance of the duties of book-keeper. *Held*, that the question of damages was for the jury.*

ACTION on bond. The opinion states the case. The defendant had judgment below.

* See *Horne Sav. Bk. v. Traube* (75 Mo. 199), 43 Am. Rep. 403, and note, 404.

D. J. Dean, for appellant.

Wallace Macfarlane, for respondent.

FINCH, J. The sureties who defend resist the action brought upon their bond, with proof which they claim establishes that their principal, in addition to the duties of book-keeper, was required to perform, and did continuously perform, the duties of treasurer of the department of docks; so that besides keeping the accounts, which was his specific duty, he was intrusted with the public money, and exposed to risks and temptations not contemplated by his bondsmen. The defense founded upon this fact assumed two forms, expressed in the separate grounds upon which a motion for the dismissal of the complaint was based. It was claimed, first, that the added employment was an extension of the risk and liability of the sureties which discharged them at once and entirely; and second, that if not so discharged, and remaining liable for Burnham's false book-keeping, the breach created by his fraudulent entries was merely technical, and the injury flowed from an embezzlement, not protected by the bond.

The sureties are never discharged by the imposition of new duties which are distinct and separable from those protected by the guaranty, unless such new employment renders impossible, or materially hinders or impedes the proper and just performance of the duties guaranteed. Where the new employment is separate and distinct, and in no respect essentially interferes with the duty covered by the bond, the imposition of such added duty is wholly a matter between the employer and servant with which the sureties have no concern. For misconduct as to the new employment, the bondsmen are in no manner responsible, and have no right to complain so long as the added and separable duties do not prevent or tend to prevent the proper and just performance of those which are guaranteed. In such a case, if misconduct occurs, the sole question is whether it was a violation of the duties guaranteed, or those outside of the bond and its protection. Ordinarily, that proves to be the only inquiry; and in all the cases cited by the respondent was the substantial point of investigation. Thus in *Nat. Mech. B'kg Ass'n v. Conklin*, 90 N. Y. 116, to which our attention is especially called, the book-keeper had been promoted to the office of teller. When we held that the guaranty related wholly to the duties of book-keeper, and such others as

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might be temporarily added while he remained such, it followed that his promotion to a new office terminated his duties as book-keeper, and so ended his responsibilities in that character, and of course the liability of his sureties, while as to his new and separate duties, the sureties had made no contract. If in that case he had remained book-keeper, the liability of the sureties as to that office would have continued, although the duties of a teller had been added to it (*Rochester City Bank v. Elwood*, 21 N. Y. 88), unless it further appeared that his failure to keep correct accounts was naturally and necessarily occasioned by the pressure or interference of his new duties. That the latter exposed him to temptation, or gave broader opportunity for dishonesty, is immaterial. For it is the very substance of the contract of the sureties, that as book-keeper he will be honest and faithful whatever temptation may approach. By their bond they vouch for his integrity, and invite the employer to repose trust and confidence. They know that the book-keeper is to be introduced into the office and the business; that the whole range of the employer's transactions must come under the servant's observation, and be intrusted to his silent fidelity; and that out of the situation will necessarily arise unforeseen opportunities and temptations. It is of no consequence how many or what, so long as they in no respect become part of, or hinder or prevent his guaranteed duty, or the preservation of his guaranteed integrity in rendering the services covered by the contract. If that were not so, proof that the money-drawer in the book-keeper's room was left unlocked and often unwatched, or the combination of the safe was disclosed to him, might serve as a defense against dishonestly kept accounts. In *People v. Pennock*, 60 N. Y. 426, the sole question considered was whether the sureties upon a supervisor's bond were liable for his default as to moneys which he was not authorized to receive in his official capacity. The board of supervisors had directed certain moneys to be paid to him, and which were so paid without legal authority, and this court held that as to such sums, his default was not within the condition of the bond. The decision went wholly upon that ground, without even a hint that the imposition of the new duty discharged the real and existing liability of his sureties for his official acts. In *Ward v. Stahl*, 81 N. Y. 406, the question again was upon the construction of the bond, and whether it covered any thing more than the collection of village taxes. In *People v. Vilas*, 36 N. Y. 460, the

rule as to private parties and the ground upon which it rests is thus stated: "Any alteration in the obligation or contract in respect of which a person has become surety without consent of the latter, extinguishes his obligation. The reason upon which the rule is founded is, that the surety has never made the contract upon which it is sought to charge him." In all these cases, the question hinged upon the construction of the bond. If the employer has not materially altered the employment guaranteed; if that remains as contemplated by the contract; it is no defense of faithlessness in that, to say that employer and servant have contracted in addition for new services with which the sureties had no concern, and which did not in their nature interfere with or injuriously affect the services guaranteed.

It is not here pretended that the additional duties imposed upon Burnham of receiving and depositing the funds of the department were of a nature to prevent or in any manner impede or hinder his faithful performance of the duties of book-keeper. It may correctly be said that it furnished him greater opportunity for embezzlement and so put temptation in his way. But precisely that suggestion was overruled in *Rochester City Bank v. Elwood*, *supra*. There the bond was given for the faithful discharge by the principal of the trust reposed in him as assistant book-keeper of the bank. In consequence of the absence of the cashier and the duties of the teller having become more onerous, the assistant book-keeper was required to assist the teller in keeping the credit journal. Availing himself of that opportunity Gold credited a deposit of \$1,625 as \$625, and embezzled \$1,000 of it. The court conceded that by this added duty imposed upon the book-keeper the latter was "better able" to cover up an embezzlement and conceal it from detection. There was thus opportunity and temptation resulting from the new duty; but it was held that the true interpretation of the bond extended to Gold's honesty in his position, the court saying that "the contract did not define the trust reposed, but indicated the department of duty to be assigned and guaranteed that the appointee was a trustworthy person to be introduced into the bank to discharge that duty."

The sureties were held liable. The new opportunity for wrongdoing furnished by the new action of the employer was not permitted to operate as a defense. If the rule were otherwise it would compel the employer to put no confidence in the honesty of the

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book-keeper, and sedulously guard his money and valuables against any opportunity for embezzlement. The true question thus is, was the loss inflicted upon the employer within the condition of the bond, and the contract of the sureties, or in other words was the contract essentially altered or modified. The bond recited that Burnham had been appointed to the office of book-keeper of the department of docks, and was conditioned that he should "in all things well, truly and faithfully perform the duties that may be legally required of him to perform and do during his continuance in the said office of book-keeper of the department of docks." If this condition, which is very broad in its terms, is narrowed by the recital, and limited to the duties of book-keeper simply, the facts show that those duties were not faithfully performed. Burnham not only embezzled the money of the department, but made false entries of deposits in the books, and omitted to make entries of receipts which should have been made, and all this purposely and with a view to conceal his wrong.

There was thus a breach of his bond. His duties as book-keeper were never terminated by promotion or change to a new or different office, nor were they in any respect altered or modified by the imposition of the entirely distinct and separate duties as to which the sureties were not bound. The respondent argues that while Burnham was not promoted to the office of treasurer he was in fact made treasurer by the act of the department. Even so much cannot justly be said. It was the duty and authority of the treasurer to receive and disburse the funds. No authority was given to Burnham to disburse a dollar. The money paid went to the credit of the treasurer and remained within his control. None of it could go to the credit of Burnham except as he stole and concealed it. His duties were merely clerical in the receipt and deposit of moneys and as an assistant to the treasurer, and his services were temporary in the sense that they could be dispensed with at any moment and were wholly within the control of the treasurer. So that his duty as book-keeper remained and was not terminated, nor was it at any time essentially or necessarily altered or modified.

That duty it is conceded, was willfully and fraudulently violated; but it is said as the second ground of defense, that the breach was purely technical; that the loss resulted wholly from the embezzlement against which the sureties had not contracted; and so that only nominal damages could be recovered. Precisely the

same contention was urged in the *Elwood* case, *supra*, and overruled. The court there said that, "where a person is introduced into and employed by a bank to assist in keeping its books, and avails himself of his situation to defraud his employers, the surety who has vouched for his honesty should answer for any loss accruing from his fraudulent or criminal conduct. Irrespective therefore of false entries, the abstraction of the money by Gold would render the surety liable for the loss. But more especially would he be liable if the false entries were concurrent and simultaneous, and each a part of the *res gesta* of guilt." That doctrine thus declared would make Burnham liable as book-keeper for the embezzlement. But the present case does not require that we should go so far, or follow the doctrine stated to its full extent, for here the amount of damages resulting from the conceded breach was a question for the jury, and might reasonably have been found by them upon the facts to have at least equalled the penalty of the bond. That penalty was \$5,000. The total defalcation of Burnham exceeded \$40,000. The embezzlements were between 1875 and 1878, or through a period of about three years. During the last eleven months of the time the books were not written up at all, and in that period Burnham's thefts reached \$11,000. The largest single item which the evidence shows to have been stolen is less than \$2,400. So that it is quite apparent that a jury might justly trace to the system of false or omitted accounts a loss of more than the penalty of the bond. If Burnham had simply stolen the funds from time to time, but had not falsified the accounts, a jury might well conclude that the robbery would have been promptly discovered, and much more than \$5,000 of it have been prevented. The court therefore should have held the defendants liable for a breach of the bond in the failure of their principal to faithfully perform his duty as book-keeper, and submitted to the jury the question of damages resulting from that breach.

The judgment should be reversed and a new trial granted, costs to abide the event.

Judgment reversed.

All concur.

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MANGAM V. CITY OF BROOKLYN.

(98 N. Y. 585.)

Constitutional law — altering salary of officer — police officers.

Police officers of cities are not within the constitutional provision forbidding legislation to change the compensation of public officers while in office

ACTION for salary. The opinion states the case. The defendant had judgment below.

Erastus Cooke, for appellant.

John A. Taylor, for respondent.

RUGER, C. J. The plaintiff brought this action to recover the sum of \$100, for each of the years 1879, 1880, 1881 and 1882, as the balance of her intestate's salary as policeman in the city of Brooklyn, alleged to be remaining unpaid by the defendant. Said intestate was appointed policeman prior to 1877. The claim is made by virtue of the charter of that city, appearing in chapter 863, Laws of 1873, which fixed the compensation of patrolman at the sum of \$1,100 per annum. It is answered to this claim that the common council of Brooklyn, by virtue of authority conferred upon them in chapter 459, Laws of 1877, have reduced the annual compensation payable to the patrolmen in that city, from \$1,100 to \$1,000. It is also claimed that the same reduction was effected by chapter 467 of the Laws of 1879. If the validity of the reduction made under either authority is established, it constitutes a defense to the plaintiff's cause of action. The appellant asserts however that these acts do not affect the questions in dispute, for the reasons:

First. That both of them were, by their terms, restricted to officers to be thereafter elected or appointed; and

Second. In case the first proposition fails, that such acts are obnoxious to the provisions of section 18, article 3 of the Constitution, as being local bills, and "creating, increasing or decreasing fees, percentage or allowances of public officers during the term for which said officers are elected or appointed."

The first proposition depends upon the meaning and effect to be ascribed to the following sections of the acts in question: Section 6

of chapter 459, Laws of 1877, and section 7 of chapter 467 of the Laws of 1879, which are similar, and the latter reads as follows: "The provisions of this act shall not apply to any officers, who, under the provisions of the Constitution, cannot have their fees, percentages or allowances increased or diminished during their present terms of offices; but said provisions shall apply to all of those hereafter elected or appointed to perform any service within the city of Brooklyn." The language of this section is upon its face ambiguous and equivocal, and requires an inquiry into its meaning before the provisions of the act can be understandingly enforced.

In a proper sense there are no public officers in the State, whose compensation may not be increased or diminished by the legislature during their terms of office, except those of governor, lieutenant-governor and other State officers named in the Constitution, judges of the Court of Appeals and justices of the Supreme Court, county judges and surrogates. These are, by the terms of the Constitution, expressly exempted from the power of the legislature to diminish, and in some cases to increase, during their existing terms. None of these persons however are officers of the city of Brooklyn, or paid from its treasury, and they are not therefore the officers referred to by the acts in question. All other public officers are subject to the power of the legislature to increase or diminish their compensation at any time, provided it be done by general law. In a strict sense therefore the language of this exception does not apply to the officers in question, for the inhibition is against such legislation by local or private bills only, and not to enactments accomplishing these objects by general law.

In accordance with settled canons for the construction of statutes however, some effect must be given to all of the language employed in framing them, provided the intent of the legislature is discoverable from the words employed, or other sources of information open to the consideration of the court, and such construction is reasonable and does not lead to absurd or unjust results.

It is quite obvious, from the language of the act, that the legislature had in mind section 18 of article 3 of the Constitution in framing it, because they use the precise language employed in that section in describing the class of officers who are not to be affected by its provisions. Thus they say it is those officers "who, under the provisions of the Constitution, cannot have their fees, percentage or allowances increased or diminished during their present terms

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in office." This language is used in section 18, article 3, and in no other place in the Constitution, and unless held to apply to that section, it must be denied any application whatever. It does not follow from this circumstance however that we must give it the effect claimed for it by the appellant. It is quite clear, if the legislature intended the provisions of the act to apply only to future elected officers, that any reference to the constitutional provision was utterly unnecessary, as their power of legislation over that subject was undeniable. It is also quite obvious, from the inclusion of the official names of the officers in question in the provisions of the act, and the clauses specially providing that the amount of their compensation should be left to the power of the common council to regulate, that the legislature did not suppose they were transcending their constitutional power in legislating as they did. If the legislature had intended that the act should affect subsequently-elected or appointed officers only, they would have said so directly and omitted all reference to the constitutional provisions.

It would seem therefore that the first clause of section 6 was inserted merely as a tentative provision to save the act from possible condemnation as being in conflict with the Constitution.

It is evident, from the consideration suggested that no conclusive inference can be drawn from the insertion of the clause in question, that the legislature intended thereby to exempt officers from the operations of the act who would otherwise be included in its provisions, but it would seem that they intended to leave the act open in that respect, to be determined by the solution of the question as to their constitutional power to pass it. The act is clearly hypothetical, and its true reading, if paraphrased according to its apparent object and meaning, would be as follows: This act shall not affect any officers named therein whose compensation cannot constitutionally be increased or diminished during their existing terms; and if so read, there is afforded no room for the contention that the legislature intended thereby to exempt the existing police force from its operation.

We thus arrive at the question whether the statutes referred to violate section 18 of article 3 of the Constitution.

It is quite certain that the act of 1877 does not infringe upon its letter, and it is only by a resort to principles of construction that the appellant can hope to nullify its provisions.

The Constitution prohibits the legislature, by local or private bills,

from increasing or diminishing the "fees, percentage or allowances" of certain officers during existing terms of office. The act of 1877 refers only to salaries, and does not purport, in itself, either to increase or diminish those, but attempts only to confer power upon the common council to fix and regulate such salaries as are payable from the municipal treasury.

The appellant claims however that the act is within the spirit and meaning of the constitutional provisions, and that therefore the attempt by the common council to reduce the patrolmen's salaries was ineffectual. The rules applicable to the construction of constitutional provisions are the same generally as those applying to statutes, and the object in both cases is to arrive at the intention of the law makers.

If the meaning of a given provision be clear and unambiguous, and leads to no absurd or unjust result, it leaves no room for the application of rules of interpretation, and must therefore be enforced according to its letter and spirit. *Potter's Dwarrie Stat. 9; Jackson v. Lewis*, 17 Johns. 475. It was said in *Newell v. People*, 3 Seld. 97, "whether we are considering an agreement between parties, a statute, or a Constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed in the order and grammatical arrangement in which the framers of the instruments have placed them. If thus regarded, the words embody a definite meaning which involves no absurdity and no contradiction between different parts of the same writing, then that meaning upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed." See also *McCluskey v. Cromwell*, 11 N. Y. 603; *Johnson v. H. R. R. Co.*, 49 N. Y. 455. If the words used in a statute are susceptible of different meanings, that one must be ascribed to them which accords with the natural and obvious signification and import of the language used. For the purpose of arriving at an understanding of its signification, it is the duty of the courts to examine the whole act, and by a comparison of, and a consideration of its various clauses and provisions, determine the meaning of any doubtful or ambiguous phraseology used therein. *Beebe v. Griffing*, 14 N. Y. 244. But where the same words are used in different parts of the same act, in connection with the same subject-matter, it is contrary to settled rules of construction to give them different meaning,

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in the several places where they occur. It was said by Lord DENMAN in *Reg. v. The Com. of the Poor Law*, cited in Potter's Dwarria, 195: "We disclaim altogether the assumption of any right to assign different meanings to the same words in an act of Parliament on the ground of a supposed general intention in the act, we think it necessary to give a fair and reasonable construction to the language used by the legislature; but we are not to assume the unwarrantable liberty of varying that construction for the purpose of making the act consistent with any views of our own." Following the rule referred to in examining the question presented for our consideration, we can see no reasonable ground for holding that salaries of public officers are included in the provision in question.

The omission of the word "salaries," and the use of the rather uncommon word "allowances" in section 18, considered by itself, would be quite significant, and suggestive of great doubt as to the real signification of the provision; but when considered in connection with other occasions where the framers of the Constitution and the law-makers have been called upon to express themselves on the subject of payment to public servants, we shall find a uniform and invariable use of language showing that the respective phrases of "compensation," "salary," and "allowances" have been used discriminatingly by them, and with a perfect understanding of their true meaning. Thus we find that the Constitution provides that "each member of the legislature shall receive for his services an annual salary of \$1,500;" but senators, when serving as members of the court for the trial of impeachments, and such members of the assembly as shall be appointed managers of an impeachment, "shall receive an additional allowance of \$10 a day." § 6, art. 3. The governor "shall receive for his services an annual salary." § 4, art. 4. The lieutenant-governor shall receive for his services an annual salary, "and shall not receive or be entitled to any other compensation, fee, or perquisite for any duty or service he may be required to perform by the Constitution or the law." § 8, art. 4. The secretary of State, comptroller, treasurer and attorney-general shall each "receive for his services a compensation which shall not be increased or diminished during the term for which he shall have been elected." § 1, art. 5. A superintendent of public works "shall receive a compensation to be fixed by law." § 3, art. 5. Three deputy superintendents "shall receive for their services a compensation to be fixed by law." § 3, art. 5. Judges of the Court of

Appeals, and justices of the Supreme Court "shall receive for their services a compensation to be established by law, which shall not be diminished during their official terms." § 14, art. 6. It is provided for the county judge that "his salary, and the salary of the surrogate, when elected as a separate officer, shall be established by law," and "shall not be diminished during his term of office." § 15, art. 6. The compensation of the clerk of the Court of Appeals "shall be fixed by law." § 20, art. 6.

"No officer whose salary is fixed by the Constitution shall receive any additional compensation. Each of the other State officers named in the Constitution shall, during his continuance in office, receive a compensation to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed, nor shall he receive to his use any fees or perquisites of office, or other compensation." § 9, art. 10.

"Judicial officers in office when this Constitution shall take effect may continue to receive such fees and perquisites of office as are now authorized by law, until the first day of July, 1847." § 11, art. 14. "Any person holding office under the laws of this State, who, except in payment of his legal salary, fees or perquisites," shall receive, or consent to receive, "directly or indirectly, any thing of value," etc., shall be deemed guilty of a felony. § 1, art. 15.

It is seen by this review that the word "allowance" is used in the Constitution in a sense entirely different and distinct from that of salary. The only instance in which it is employed, aside from the section in question, being to denote something to be given or yielded by the State in addition to a stated compensation, termed a salary. The generic term used by them to cover all forms of payments made to public officers for services is invariably that of compensation, and the specific term used to denote payments to officers having a fixed, definite and stated compensation, is that of salary.

A brief reference to the action of the several conventions which preceded the adoption of the present Constitution will show that the words of the existing section were deliberately selected after the rejection, by the people, of a provision couched in more comprehensive language. Among the sections submitted to the people by the constitutional convention of 1867, was the following: § 17. "The legislature shall not grant any extra compensation to any public officer, servant or contractor, nor increase or diminish any compensation, except that of judicial officers, during their term

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of office." Proceedings and Debates, p. 3961, Atlas ed. This provision, together with the Constitution, of which it was a part, was rejected by the people. Subsequent to this rejection, a convention assembled under the authority of chapter 884, Laws of 1872, and framed provisions, which after being revised by the action of the subsequent legislature, resulted in the submission to the people of the Constitution as it now stands, and as thus submitted it was approved and adopted by them.

It will thus be seen that the framers of the Constitution, when they attempted to draw provisions specifically limiting the power of the legislature over the compensation of public officers, used the most appropriate, natural and comprehensive language adaptable to the purpose which they had in view, and with a discriminating sense of the meaning of the words used by them. It is impossible to resist the conviction that by the use of the words "salary" and "compensation" in all of the provisions attempting the inhibition of the legislature from interfering therewith, and their exclusion from the clause in question, they intended to exempt persons whose services were payable by a fixed and stated compensation, from the operation of the section. It will also be observed that in the structure of the clause referred to, the words first used, and presumably those to which the most importance was attached, are those of "fees and percentages," and then follows the word "allowances," which seems to have been employed by way of repetition, and as a possible cover for some form of compensation of a similar character not included in its previous language. The rule embraced in the maxim of *noscitur a sociis* seems to be peculiarly applicable to the question presented, and requires a definition of the word "allowance" similar to that of the language to which it is so closely allied.

The natural interpretation of these provisions is that they were intended to include only those irregular, indefinite and uncertain modes of compensating public servants which were indicated by words of like character and meaning as those of "fees," "percentage," etc. The case of *McGaffin v. City of Cohoes*, 74 N. Y. 389; s. c., 30 Am. Rep. 307, is illustrative of the rule referred to. There the words "contract, obligation or liability" were held, by force of the maxim in question to exclude liability for torts; the late Chief Judge CHURCH saying, that "words are often used redundantly or repetitiously, without strict regard to the meaning of

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each, but for greater caution to express the full meaning of the principal subject. In such cases, the maxim *noscitur a sociis* is applied." In the case of *Corning v. McCullough*, 1 N. Y. 47; s. c., 49 Am. Dec. 287, it was held that a clause in a statute prescribing three years limitation "for any forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved," should be construed as meaning actions for a forfeiture, or cause of action of like nature only, and not to apply to cases of contract liability." See, also, *Aikin v. Wasson*, 24 N. Y. 484; *Coffin v. Reynolds*, 37 N. Y. 644.

It seems to us that we cannot, without doing violence to the meaning and intent of the authors of the Constitution, ascribe to them, by the use of such a word, in such a relation, an intention to reach and affect so important a subject as that embraced in regulating the compensation of those numerous public servants whose services are compensated by fixed salaries. Whether we consider the ordinary and popular signification of the word, or the more accurate and technical meaning attached to it by lexicographers, it is entirely inappropriate to express the idea of a fixed compensation adopted for the payment of services rendered by one person to another. The word "allowance" imports the voluntary act of one party in doing something which is in his discretion to perform or withhold at pleasure. To allow implies the right, to determine, and is the act of a superior toward a dependent granting a privilege which he has authority to confer or deny. It does not express the relations existing between co-contractors, vendor and vendee, or employer and employee where there is a right secured by contract on one side, and no power of voluntary action on the other.

Allowances are made by husband to wife, parents to children, the head of a family to its members, superannuated dependents and servants, from the benevolent to the poor, and in cases where the act is discretionary with the donor, as a reward for benefits conferred or services voluntarily rendered by one to another.

Referring to some of the uses of the words in question adopted by the legislature in statutes, we find by section 3, chapter 521, Laws of 1880: "No officer or person who is paid a salary from the city treasury shall receive to or for his own use any fees, costs, allowances, perquisites of office, commissions," etc., and the comptroller is empowered to examine any such officer under oath touching "the amount of any fees, costs, allowances, perquisites."

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etc. Allowances have been authorized to be made by the court to parties in actions in certain cases, and extra allowances in actions to foreclose mortgages, for partition of real property, and to obtain construction of wills, etc. (Code of Pro., §§ 303-309; and Code of Civ. Proc., §§ 3252, 3253); also for expenses of poor witnesses (§ 1, chap. 155, Laws of 1869, and so too in cases of divorce, infancy, lunacy and wards of court, salvage, and all discretionary awards. They are also made to sheriffs on attachment proceedings when no fixed charges are provided. Code of Civ. Pro., § 956. They were formerly authorized in some special cases to be made to canal contractors for work and labor (§ 2, chap. 273, Laws of 1841; 1 R. S. 632, § 37; 653, §§ 76, 77; 655, § 2), and to compensate appraisers appointed by loan commissioners. 3 Stat. at Large 87, § 35. *Per diem* allowances were made to the justices of the Supreme Court in addition to their salaries, and it was provided that the compensation of those residing in New York city should not thereby be deemed to be reduced. Chap. 308, § 9, Laws of 1870. The health officer receives an allowance by way of commission on collections from coasters. Chap. 302, Laws of 1829. The clerks of the senate and assembly received an allowance for stationery (§ 1, chap. 1, Laws of 1859), but were to receive a salary and no extra allowance by section 3, chap. 379, Laws of 1879. Commissioner of public accounts receives a *per diem* compensation and additional allowance for mileage. Chap. 223, Laws of 1863. Pilots have an allowance for extra service, § 8, chap. 69, Laws of 1847, as do also receivers of insolvent financial and life insurance companies. § 1, chap. 141, Laws of 1821; § 2, chap. 3, Laws of 1841; chap. 442, Laws of 1871; chap. 902, Laws of 1869.

To the uses of the words shown by these citations, others of the same character could be made indefinitely, and we have yet to discover any employment of the word "allowance" by law-makers or others which is the exact equivalent of either of the words "salary" or "compensation." Reference to the works of the lexicographers shows Webster's definition to be, "the act of allowing, granting or admitting," "permission or license," "that which is allowed; a portion appointed; a limited quantity of meat and drink when provisions fall short." "A customary deduction from the gross weight of goods." The substance of the definitions in Crabbe's English Synonyms is that an allowance is gratuitous; it ceases at the pleasure of the donor. Stipends and salaries are the requital of some

supposed service, and are paid yearly or at even portions of the year, and are the subject of contract between the parties.

Worcester gives a definition similar to that of Crabbe, but refers to the word "salary" as one of the synonyms of "allowance," distinguishing them however by stating that the latter is gratuitous and the former a stated compensation, payable under a contract. Richardson's English Dictionary gives, "to permit, to concede, to suffer, to assent, to yield." Other lexicographers give definitions similar to those of Worcester and Crabbe, and seems to exclude the idea that the terms are analogous, except perhaps in a very loose and imperfect sense.

It would seem from the foregoing illustrations that the word "allowance" has a plain, definite and precise meaning attached to it by authors and law-makers, and the duty of the court to enforce it as it reads is clear and unmistakable. We have no power, and it is not our office to stretch the meaning of words used, for the purpose of covering an object which we have no other means of determining to have been within the contemplation of the authors of the Constitution, than that of the language employed by them. It therefore seems to us not only a reasonable, but a necessary inference from the invariable use by the authors of the Constitution of the words "salary" and "compensation" when referring to that kind of payment made to public officers by way of salary, and their deliberate exclusion from the clause in question, that they did not intend to include salaried officers within its meaning.

This view is greatly strengthened by the express provisions made in that instrument with reference to the immutability of the compensation of a large number of such officers, and the inference which may be drawn therefrom that they did not intend to enact general provisions to accomplish similar objects.

In opposition to our views it is urged that such a construction would leave no subject of importance for the provisions in question to operate upon; but we do not think this is so. While it is obvious that it does to a certain extent narrow its application, yet a large body of public officers whose compensation consists solely of fees, percentages and allowances, such as sheriffs, county clerks, registers of deeds, coroners, port wardens, harbor-masters, pilots, commissioners, health office, justices, constables and others who might be named, are still left to be affected by these provisions of the Constitution.

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We are quite aware of the great importance of the question presented, and of the divers views existing with reference to it among judges and members of the legal profession; but no sufficient reason has been suggested, as we think, which authorizes the importation into the Constitution of a meaning which does not flow naturally and obviously from the language employed in it.

Other minor questions raised by the learned counsel for the appellant have been examined by us, but we find none of sufficient plausibility to raise serious doubt as to the correctness of the judgment appealed from.

The judgment should therefore be affirmed.

Judgment affirmed.

All concur.

CASES
IN THE
SUPREME COURT
OF
IOWA.

ALLEN V. CLAYTON.

(88 Iowa, 11.)

Constitutional law — "banking corporation" — liability of stockholders.

A constitutional provision that stockholders in bank corporations shall be liable for the corporate debts is applicable only to banks issuing bills of circulation.

ACTION to enforce individual liability of stockholders. The opinion states the case. The plaintiff had judgment on demurrer.

Trimble, Carruthers & Trimble, Wright, Cummins & Wright, Payne & Eichelberger, Jones & Steel and Amos Stickel, for appellants.

D. P. Stubbs, for appellees.

SERVERS, J. The first Constitution was adopted in 1846, and it contained the following provisions (See Art. 8) :

"SECTION 1. No corporate body shall hereafter be created, renewed or extended, with the privilege of making, issuing or putting in circulation any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money.

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The general assembly of this State shall prohibit by law any person or persons, association, company or corporation from exercising the privileges of banking, or creating paper to circulate as money.

“§ 2. Corporations shall not be created in this State by special laws, except for political or municipal purposes; but the general assembly shall provide by general laws for the organization of all other corporations except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The State shall not directly or indirectly become a stockholder in any corporation.”

Under the foregoing provisions, corporations having the power to issue bills to circulate as money were absolutely prohibited, but corporations having the banking powers of discount and deposit could lawfully exist; and such seems to have been the opinion of the first general assembly which convened under the Constitution, in November, 1846. It proceeded to pass the general incorporation law contemplated by the Constitution, which provided that any number of persons might incorporate themselves for the transaction of any business which might be the lawful subject of a general partnership, and the incorporators were authorized to exempt private property from the payment of corporate debts. Chap. 81, Acts First General Assembly.

If any statute was enacted, as required by the Constitution, at that or any subsequent session of the general assembly, prohibiting any “person, association, company or corporation from exercising the privileges of banking, or creating paper to circulate as money,” our attention has not been called to it. The reason for this omission we suppose to be that if there was no constitutional provision upon the subject, it required an affirmative statute so authorizing, before any corporation or person could issue bills to circulate as money.

But it is undoubtedly true that in 1846 a general partnership could have been formed for the purpose of discounting bills, receiving deposits and issuing evidence of indebtedness therefor, and no other statute than the general incorporation law was required to enable corporations under it to engage in and lawfully transact the banking business of discount and deposit.

A similar statute to the general incorporation law was afterward enacted in 1851. Chap. 43 of the Code of 1851; and the same

statute in substance has ever since been in force. Rev., chap. 52; Code, title 9, chap. 1.

This Constitution remained in force until the adoption of the new Constitution in 1857, and it is historically true that many corporations had been organized in other States between the periods above stated, with power to issue bills to circulate as money, and that this State was flooded with such bank bills. Their value was uncertain and great dissatisfaction was expressed in the public journals, and otherwise, with the restrictive provisions of the Constitution of 1846, in relation to corporations having power to issue bills to circulate as money. It was said that there should be organized in this State banks of issue, which being under the control of the State, there would at least be some guaranty as to their solvency. The convention and constitution of 1857 were the outgrowth of this public sentiment. We hazard nothing in making the assertion that but for the public demand for the abrogation of the Constitution of 1846, and the adoption of one under which corporations with power to issue bills to circulate as money could be organized, the Constitution of 1857 would not have been adopted. The great evil of the Constitution of 1846, in the public estimation of the time, was the prohibition therein contained of banks with power to issue bills to circulate as money. No complaint was made, and it was not supposed that the Constitution of 1846 restricted or prohibited the establishment of banks of discount and deposit. But the popular demand was that banks with full banking powers should be authorized and established, to the end that the currency issued in other States, known as "red dog" and "wild cat" would be expelled from the State.

A convention was called, and the Constitution of 1857 was adopted by the people, with reference to and full knowledge of the facts heretofore stated. It contains the following provisions:

"ARTICLE VIII — CORPORATIONS.

"SECTION 1. No corporation shall be created by special laws; but the general assembly shall provide by general laws for the organization of all corporations hereafter to be created, except as hereinafter provided.

"§ 2. The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals.

"§ 3. The State shall not become a stockholder in any corpora-

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tion, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the State.

“§ 4. No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.

“§ 5. No act of the general assembly authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall take effect, nor in any manner be in force, until the same shall have been submitted separately to the people at a general or special election, as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.

“§ 6. Subject to the provisions of the foregoing section, the general assembly may also provide for the establishment of a State bank, with branches.

“§ 7. If a State bank be established, it shall be founded on an actual specie basis, and the branches shall be mutually responsible for each other's liabilities upon all notes, bills and other issues intended for circulation as money.

“§ 8. If a general banking law shall be enacted, it shall provide for the registry and countersigning by an officer of State of all bills or paper credits designed to circulate as money, and require security to the full amount thereof to be deposited with the State treasurer in United States stocks, or in interest-paying stocks of States in good credit and standing, to be rated at ten per cent below their average value in the city of New York for the thirty days next preceding their deposit: and in case of a depreciation of any portion of said stock to the amount of ten per cent on the dollar, the bank or banks owning said stock shall be required to make up said deficiency by depositing additional stocks; and said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer, and to whom.

“§ 9. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or by her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

“§ 10. In case of the insolvency of any banking institution, the bill-holders shall have a preference over its other creditors.

“§ 11. The suspension of specie payments by banking institutions shall never be permitted nor sanctioned.

“§ 12. Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.”

The first general assembly under the Constitution of 1857 met in 1858, and it passed two acts contemplated by the Constitution; one “authorizing general banking,” and the other authorizing the establishment of a State bank and branches, with power to issue bills to circulate as money, and in accordance with the Constitution, these statutes were submitted to and approved by a majority of the electors. A State bank was organized, which issued bills which freely circulated as money, and it continued in existence until 1870. During this time, the general incorporation law, first passed in 1846, was in force, and it made no provision for filing and recording articles of incorporation of corporations formed under it, except those for the construction of works of internal improvement, in the office of the secretary of State. We therefore are unable to say whether the assertion made by counsel during the oral argument, that corporations with the banking powers of discount and deposit had been organized under the general incorporation law prior to 1870, is historically true or not; but as early as 1860 the existence of such corporations was recognized by the general assembly. Rev., page 283, art. 2.

In 1870 all corporations organized under the general incorporation law were required to file and have the articles of incorporation recorded in the office of the secretary of State. Chap. 172, Acts of the Thirteenth General Assembly.

In that, the next, and succeeding years, down to the close of 1883, there have been organized under said statute nearly or quite one hundred corporations which have assumed the banking powers of discount and deposit, all of which, we shall assume, have exempted private property from the payment of corporate debts. The judicial and legislative history of the State fails to show that the right and power to so exempt private property have been doubted or denied from 1846 until the institution of this suit, a period of thirty-five years.

Allen v. Clayton.

In the light of the foregoing facts, we have to determine the proper construction of article 8 of the Constitution of 1857. The first section of the article refers to corporations generally; the second to those for pecuniary profit; the third prohibits the State from becoming a stockholder in any corporation, and the fourth refers alone to banking corporations; and it is insisted that banks of discount and deposit, as well as those issuing bills to circulate as money, are there referred to; and as the same words—"banking corporations"—are used in both sections 4 and 9, that the same construction must be placed on the same words in both sections. But this does not necessarily follow. The argument is entitled to great consideration, but it is not controlling. The same reason exists for prohibiting a municipal corporation from becoming a stockholder in one kind of a bank as in another. But as the bill-holder, as a matter of fact, is compelled to accept the circulating medium in use as money, and the depositor is a free agent, who can deposit his money in a bank or not, as he chooses, and whose residence is usually contiguous thereto, and as the privilege of issuing bills to circulate as money is an exercise of sovereign power which belongs to the State, the same reasons for interference on the part of the State to protect the bill-holder do not exist as to the depositor. Besides this, the prohibition contained in section 4 is a limitation on the law-making power, and may well be designated as the constitutional policy, which was not intended to act upon or control individual rights or liabilities.

Sections 5, 6, 7, 8, 10 and 11 have exclusive reference to banks of issue, and the key-note to all of them is found in section 5. It is there provided that corporations with banking powers shall not be created, unless the statute so providing shall be submitted to and be approved by a majority of the electors of the State. This means full or unlimited banking powers; that is, the power to issue bills to circulate as money, and also the power to discount bills and receive deposits. The general incorporation law in force when the Constitution of 1857 was adopted was broad enough, as we have said, to permit the organization of banks of discount and deposit, and something more than this was contemplated by the Constitution. This being so, what is the proper construction of section 9? The words there used are banking corporations. The subject-matter contemplated in the several sections just mentioned, which precede, and also those which follow,

section 9, is corporations having the power to issue bills to circulate as money. Clearly these are "banking corporations," just as certainly as those defined in section 5 as having banking powers. To arrive at the meaning of the words "banking corporations" in section 9, the sections preceding and following it, which have reference to the same subject-matter, must be read and considered.

This is a fundamental rule, to which there is no exception, unless the words to be construed have such a clear and precise meaning that there is and can be but a single conclusion as to what was meant. Counsel insist, and it is true, that there are banks of issue, and those of discount and deposit. If a corporation possessed all of these powers, it would be a banking corporation, and it would be such a corporation if it had the power only of issuing bills to circulate as money, or if it only had the power to discount bills and receive deposits, it would still be a banking corporation.

The words "banking corporations," as used in section 9, therefore, do not necessarily include or refer to banks of discount and deposit. When all the provisions of the Constitution bearing on the subject-matter are considered, it seems to us to be too clear for any reasonable doubt that "banking corporations" in section 9 mean, and were intended to mean, the same thing precisely as "banking powers" in section 5, and "banking institutions" in sections 10 and 11. We are unable to understand why the subject-matter of section 9 should be construed to be other or different from the subject-matter of the sections which precede and follow it. Why should the words of section 9 have attached to them a broader meaning, or include more, than it is self-evident similar words in sections 5, 10 and 11 were intended to mean or include?

Without doubt, the words "banking institutions," in sections 10 and 11, mean and have reference to the same kind of corporations as those contemplated in section 5 as having "banking powers," and the words "banking corporations" in section 9, in accordance with the acknowledged rules of construction, must mean the same thing or class of corporations; that is, those with power to issue bills to circulate as money. This view we think is, to say the least, in accord with *Pape v. Capital Bank of Topeka*, 20 Kans. 440; s. c., 27 Am. Rep. 183, and *People v. Loewenthal*, 93 Ill. 191. But if it can be said, when all the provisions of article 8 are read and considered, that there is any doubt as to the correctness of the conclusion reached, then it is proper to consider:

First. The evil intended to be remedied by the adoption of the Constitution of 1857; and here there is no room for serious doubt, as we have heretofore sufficiently indicated.

Second. This is confirmed by the debates in the convention which framed the Constitution. It may be said with safety that banks of discount and deposit, as distinguished from those issuing bills to circulate as money, are not mentioned in the debates, or if so, our attention has not been called thereto, while there are numerous references made to banks of issue. Our attention however is specially called to a proposition introduced into the convention, making the officers and stockholders of every corporation issuing bills to circulate as money individually liable (for corporate debts we suppose) during the time of their being officers and stockholders. This proposition was defeated in the convention. It is said that this action clearly indicates the intent of the convention. But what intent is indicated? None other we think than that the convention was unwilling to make the officers and stockholders liable to the extent contemplated by the proposition referred to, and thought that section 9, as it now stands, as it has been construed by us, was as far as it was necessary or proper to go.

Third. The contemporaneous legislative construction of the Constitution; and here we desire to call attention to article 2, page 280, of the Revision, requiring "banking corporations to make quarterly statements." This clearly recognizes the existence of banking corporations having the powers only of discount and deposit. It cannot be presumed that the general assembly would do a foolish or unnecessary act, and therefore it must be assumed that there were corporations of the character indicated in existence, the legality of whose organization is clearly recognized by the statute above mentioned, which was passed within three years after the adoption of the Constitution.

Fourth. The practical construction of the Constitution adopted by the people of the State, as evidenced by the numerous banks of discount and deposit known to have been organized during and since 1870, and which are now engaged in doing a large business. To this must be added the fact that some of them failed and proved insolvent, and no such claim as the present was ever made, to our knowledge, until now. That all these matters may be and should be considered when the meaning of the words of the Constitution are not entirely clear and free from doubt, see Cooley on Constitu-

tional Limitations (4th ed.), pp. 68-83, and authorities cited in notes. It seems to us that the words "banking corporations," used in section 9, mean banks of issue, and not those of discount or deposit; and that if this be doubtful, then the legislative and practical contemporaneous construction of the Constitution leaves no room for for doubt in this respect. The result is that the demurrer was erroneously overruled, and that the judgment below must be reversed.

Judgment reversed.

BLACHLEY V. LABA.

(68 Iowa, 22.)

Parent and child—liability of parent for adult child's necessities.

A father is not liable for necessities furnished to his adult unmarried daughter, at her request, although she lives with him, and he knows and does not object to the furnishing. (*See note, p. 725.*)

ACTION for medical services. The opinion states the point. The plaintiff had judgment below.

G. Taylor Wright, for appellant.

E. L. Hart, for appellee.

BECK, J. I. The amount in controversy in this cause being less than \$100, it was certified by the judge of the Circuit Court for determination upon the following question of law:

"Is a father legally liable to a physician for the latter's services in professionally treating the adult but unmarried daughter of said father during her last illness, where the physician was called by the daughter, she at the time living with her father as a member of his family, that being her home; the treatment being necessary and proper, and rendered with the knowledge of the father, and without any objection on the part of the latter to the physician."

II. At common law, a father is not liable for necessities furnished an adult child. And it may be admitted, for the purposes of this case, that medical treatment is included in the term "necessaries." This rule prevails though the child be at the home of the father when the necessities are furnished. *Crane v. Baudouins*, 55 N. Y. 256; *Boyd*

Blachley v. Laba.

v. *Sappington*, 4 Watts, 247; *Mills v. Wyman*, 3 Pick. 207; *Norris v. Dodge's Adm'r*, 23 Ind. 190; *Wood v. Gill*, Coxe (N. J.), 944.

The fact that the adult child is a member of the family of the father does not render him liable for necessities furnished upon request of the child. The father as the head of the family is not liable for necessities furnished its members, other than the wife and minor children. Servants, lodgers and boarders are members of the family, as well as all others who are subject to the authority of its head. See Webster's Dictionary. But for necessities furnished none of them is the father liable. An adult son or daughter whose home is with the father is of this class of persons.

[Omitting minor points.]

The foregoing discussion disposes of all points argued by counsel. It is our opinion that the judgment of the Circuit Court ought to be reversed.

Judgment reversed.

ADAMS, J., dissenting.

NOTE BY THE REPORTER.—In *Crane v. Boudoune*, 55 N. Y. 258, FOLGER, J., said: "Prominent among those which are relied upon is the fact that the patient was the daughter of the defendant. And were she a daughter for whom, by reason of her minority and dependence upon him, the defendant was under a natural obligation to provide necessities, this fact would be strong, with others to be mentioned, to sustain an implication of a promise. See 13 Johns. (*infra*). But the relations between the defendant and her were not such as that there was upon him such obligation. She was much past her majority; she was married; she had lived with her husband and their children separately from her father, in a house of their own; she was at the time living with her husband and their children. Her husband was bound primarily to supply for her all that she needed. Though she was brought from their own house to that of the defendant, it was at her mother's instance and for a special purpose, that of having her under the immediate care and attention of her mother. No reason for the removal other than this is shown. This did not impose upon him any greater general obligation than existed before. Nor did it give ground for the law to imply a special obligation. Again, the interest exhibited in the case by the defendant to the plaintiff; his recital to him of a history of her trouble; his presence when the plaintiff made his professional calls, alone and in consultation; his receiving directions as to treatment; his recognition, to others, of the fact that the plaintiff was in attendance; his recital to others of the plaintiff's opinion of the patient's condition; and his knowledge of the frequency and length of continuance of the professional visits of the plaintiff, without any disclaimer on the part of the defendant of liability, are relied upon as circumstances making a basis for an implication.

"It is true that particular acts will sometimes give rise to particular obliga-

tions, duties and liabilities. But the party whose acts are thus to affect him must be in such predicament as that those acts have, of legal necessity, a significance attached to them, at the time, which he may not afterward repel. Broom on Common Law was cited by the court below as authority for the above rule, and it was applied to this case. But the illustration he gives of the rule shows that it is in a different case that it operates, viz.: 'If I employ a person to do any business for me, or to perform any work, the law implies that I undertook or contracted to pay him as much as his labor deserves.'

"It is true that a person may not avail himself of the benefit of services done for him without coming into an obligation to reward them with a reasonable recompense. But he cannot be said in the meaning of the law, to avail himself of services as so done when they are not for his individual benefit, nor for that of any one for whom he is bound to furnish them. The acquiescence of one in the rendering of service or benefit to another, not entitled to call upon him therefor, is not equivalent to an acknowledgment that it is rendered at his request. So far as legal responsibility was concerned, the defendant, though the father of the patient, was a stranger to her and to her necessities. He could neither require of her, nor be required upon by her. It has been held that a special request by a father to a physician to attend upon his son, then of full age but lying sick at the father's house, raised no implied promise on the part of the father to pay for the services rendered. *Boyd v. Sappington*, 4 Watts, 247; and so in *Veitch v. Russell*, 8 Q. B. Rep. 927, it is said: A physician attends in every case on request; that fact alone is not sufficient for the inference of a special contract; and see *Sellen v. Norman*, 4 Carr. & P., 97 Penn. St. 81, 284. Still less where there has been no special request by the father to the physician, and no more than acquiescence in his calls. It was the duty of the plaintiff to know or to learn the true legal status of the patient, and what were her true legal relations to the defendant; and he cannot rely upon any seeming legal and necessary dependence of her upon him. In the case of minor children, even, the law imposes this duty upon those who would furnish them with necessities, relying upon the credit of their fathers and seeking to charge them. *Hunt v. Thompson*, 4 Ill. 179; *Van Valkenburgh v. Watson*, 13 Johns. 480; s. c., 7 Am. Dec. 395. *A fortiori*, is it so in the case of an adult married daughter living with her husband, so that all these circumstances, upon which stress is laid in behalf of the plaintiff, afford no support to his claim.

"As it would be unnatural for the parent of an invalid child, though legally emancipated, or for an intimate and confidential friend of her, not to know the rise and course of her malady, not to be interested in the state of it as disclosed at any time to skilled inspection, not to be so anxious as to be in waiting when scientific skill was to be applied for its cure, not to be ready to receive directions for treatment in the intervals; so it is not to be implied in the one case more than in the other that from these manifestations, because unaccompanied with an express repudiation of liability, a liability may be implied. They are to be referred to natural affection and friendly sympathy, rather than to an acquiescence in the rendition of a personal benefit, or counted as acts done under a sense of obligation."

RICHARDS V. GRINNELL.

(68 Iowa, 44.)

Partnership — real estate — implied sharing of losses — statute of frauds.

On a petition averring a joint adventure in real estate, by parol agreement, and that the deeds were to be taken in the name of the plaintiff, and to be held in trust for both parties, "who should have equal interests and share in the common venture," the plaintiff's investment with interest to be first returned to him, *held*, that the parties were partners.*

ACTION for accounting of partnership. The opinion states the case. The defendant had judgment below.

McNitt & Tisdale, for appellant.

J. B. Grinnell, for himself.

ROTHROCK, C. J. [Omitting detailed statement of pleadings.] It is claimed by defendant that the agreement set up in the petition did not constitute a partnership, because by the contract the defendant was not bound to bear a proportion of the losses, if losses there should be. It is well settled that the mere participation in the profits of a venture or business does not constitute a partnership between the parties to the transaction. *Ruddick v. Olis*, 33 Iowa, 402, and authorities there cited.

But it is not necessary, in order to constitute a partnership, that there be an express agreement that each party shall bear a share of any losses which may occur in the business. This may be inferred from the other provisions of the contract, and the nature of the business, and the relation of parties to the business to be transacted. In this case while it is true that there is no averment that it was expressly agreed that the defendant should bear his share of any losses there might be, yet it is averred that the deeds to the land to be purchased "were to be taken in the name of the plaintiff, and to be held in trust for both parties, who should have equal interests and share in the common venture, the capital invested and furnished by plaintiff, with ten per cent interest thereon, reckoned annually, to be first returned to him."

* See *Williams v. Gillies*, 75 N. Y. 197.

This is a distinct averment that the defendant should have an equal interest in the land with the plaintiff. The land was to be held in trust for both parties.

It must be remembered that we are determining this case upon a demurrer to the petition, and that the allegations of the petition must be regarded as true. Taking the whole pleading together, we incline to think that a participation in losses is fairly to be inferred.

In *Parsons on Partnership*, 60, it is said that "whether two or more persons are partners to each other must generally, and perhaps always, be determined by the intention of the parties, as the same is expressed in their contract, or may be gathered from their acts, and from all the circumstances which are available for the interpretation or construction of the contract."

In the same work, on page 57, it is said: "When parties agree to enter into an association for the purpose of buying or selling, and carrying on a joint business indefinitely, no stipulation for dividing profit and loss is necessary, as that is an incident to the prosecution of their joint business."

In *Miller v. Hughes*, 1 A. K. Marsh. 181; s. c., 10 Am. Dec. 719, the contract between the parties was silent as to losses. The court used this language: "The principal ground urged in the argument in this case against considering Brickley and Miller as partners was, that there was no agreement that Brickley should be liable to sustain a proportion of the loss. But as he was entitled to a share of the profits, it follows as a legal consequence that he must share the loss. The rule in this respect is that he who shares in the advantages must also share in the disadvantages of the partnership concern."

The defendant cites the case of *Ruddick v. Otis*, 33 Iowa, 402, as sustaining the claim that the facts in this case do not show a partnership. In that case, Gafford & Co., the assignors of the plaintiff, paid to Otis & Snow the sum of \$2,000, and took from them the following writing:

"Received of Gafford & Co., \$2,000 to invest in wool, said Gafford & Co. to receive two-thirds of the net proceeds or profit in the sale of the wool, and Otis & Snow one-third.

"OTIS & SNOW."

There was a loss in the transaction, and the assignee of Gafford & Co. sought by the action to recover one-third of the loss. Otis &

Snow denied that there was any agreement for a partnership, and claimed that they acted merely as agents for Gafford & Co., and were to receive one-third of the net profits for their services.

There was a conflict in the evidence as to the nature of the employment of Otis & Snow, and the court found that the preponderance was that they were to buy the wool and receive for their services one-third of the net profits.

The important distinction between that case and this is, that here it is distinctly averred in the petition that the defendant should have a joint interest in the land. If in the case cited, it had been distinctly agreed that the wool to be purchased should be the joint property of the parties, the cases would be very much alike.

We think the demurrer should not have been sustained upon this ground, because of the averment that the defendant was to have an equal interest and share in the business. If he was to give advanced information merely, and have no interest in the venture, further than to receive for his services to the plaintiff one-half of the net profits, then there was no partnership, and consequently no right of action against the defendant.

It is further contended that the agreement, if a contract of partnership, being for a partnership for the purpose of dealing in real estate, is void under the statute of frauds, because it is not evidenced by any writing but rests in parol. This question has been much discussed by the courts, and it is not to be denied that there are adjudged cases which hold that such a contract is within the statute of frauds. See *Smith v. Burnham*, 3 Sumn. 435.

On the other hand, there are many cases which hold that a parol contract of partnership is not within the statute. *Dale v. Hamilton*, 5 Hare, 369; *Essex v. Essex*, 20 Beav. 449; *Bunnell v. Taintor's Adm'r*, 4 Conn. 568; *Chester v. Dickerson*, 54 N. Y. 1; s. c., 13 Am. Rep. 550; *Holmes v. McCray*, 51 Ind. 358; s. c., 19 Am. Rep. 735.

In *Dale v. Hamilton*, it is said that "a partnership agreement between A. and B., that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands may be proved, without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the statute of frauds; and such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing."

In *Chester v. Dickinson*, it is said: "Most of the conflict in the
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authorities has arisen about the title to the real estate after the dissolution of the partnership, or the death of one of the partners. But suppose two persons, by a parol agreement, enter into a partnership to speculate in land, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made, no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve and sell lands. While they are doing this, do they not act as partners, and bear a partnership relation to each other? Within the meaning of the statute, in such case neither conveys nor assigns any land to the other, and hence there is no conflict with the statute."

We think the cases above cited are in accord with the decided weight of authority, and in our opinion they are founded upon sound reason and correct principles. It is everywhere held, that where land is held by a partnership, it is as between the parties, and as to the creditors of the firm, to be treated as personal property. Such being the law, it would seem to follow that the statute of frauds can have no application to land thus held and owned. [Omitting minor point.]

Judgment reversed.

BOYCE V. WABASH RAILWAY COMPANY.

(68 Iowa, 70.)

Jurisdiction — negligence — remedy under statute of another State.

An action may be maintained in Iowa against a railroad company for negligently killing a mule in Illinois, the remedy being granted by the statutes of both States.*

ACTION for killing a mule. The opinion states the case. The defendant had judgment below.

Hagerman, McCrary & Hagerman, for appellant.

Anderson Bros. & Davis, for appellee.

* To the same effect, *Morris v. Chicago, etc., R. Co.*, Iowa Supreme Court, April, 1885; see *Debevoise v. N. Y., etc., R. Co.*, *ante*, p. 683.

Boyce v. Wabash Railway Company.

SEEVERS, J. The court found that the defendant killed a mule in the State of Illinois, which was the property of the plaintiff, under such circumstances as will entitle the plaintiff to recover double its value under a statute of that State. As a conclusion of law, the court held, that as the action was based on a statute of Illinois, it had no jurisdiction of the subject-matter, and rendered judgment for the defendant, to which the plaintiff excepted.

[Minor question omitted.]

The question to be determined we understand to be whether there can be a recovery under the statutes of Illinois in the courts of this State. As there is a similar statute in this State, it can properly be said that the policy is the same in both States. If a recovery is allowed, the public policy of this State will not be in any manner infringed. This is not an attempt to give extra-territorial force to a statute of this State, nor to recover under a statute thereof for the invasion of a right, or the infliction of a wrong, in some other State or country. This case is therefore distinguishable from *Whitford v. Panama R. Co.*, 23 N. Y. 465, and *Hyde v. Wabash R. Co.*, 61 Iowa, 441; s. c., 47 Am. Rep. 820.

If this cause of action existed at common law, we apprehend a suit could be maintained and a recovery had in this State. In *Smith v. Bull*, 17 Wend. 323, it was held, that an action for assault and battery committed in Pennsylvania could be maintained in New York. It cannot be a subject of dispute that personal actions, whether based on contracts or torts, are under the common law transitory. In this and several other States there are statutes providing in substance, where a wrongful act causes death, that a right of action survives to the administrator or next of kin of the deceased.

Under these statutes, it has been determined, in two recent and well-considered cases, that an action may be maintained in one State, although the wrongful act which caused the death was committed in another State. *Dennick v. Railroad Company*, 103 U. S. 11; *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48; s. c., 38 Am. Rep. 491.

These cases are based on the thought, tersely expressed by MILLER, J., in the case first cited, as follows: "It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or common-law right. Whenever

by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."

The rule adopted in these cases we deem to be correct, and we are content to follow them, without stating our reasons at length; for we could only repeat what has been so well said in the cases above cited.

The following cases are cited as announcing the contrary doctrine: *Woodard v. Michigan R. Co.*, 10 Ohio St. 121; *Richardson v. N. Y. C. R. Co.*, 98 Mass. 85; and *McCarthy v. C., R. I. & P. R. Co.*, 18 Kans. 46; s. c., 26 Am. Rep. 742. We regard it as doubtful whether either of these cases, fairly considered, determines the question whether the action, if brought by the proper person, cannot be maintained.

It is insisted that the statute in question is in the nature of a police regulation, and therefore no recovery can be had in this State, because our courts are not open for the enforcement of such regulations. It is claimed that this was determined in *State v. Helmer*, 21 Iowa, 370. That was an action on a judgment obtained in Indiana in a bastardy proceeding. The question in the case was whether the action could be maintained, and it was held that it could, because the original cause of action had become merged in the judgment, and it was the latter only on which a recovery was asked. But it was in substance said, by way of argument, that the original action could not have been maintained in the courts of this State.

For the purposes of the case at bar this will be conceded; and it may with propriety be said that a bastardy proceeding partakes of the nature of a criminal action. And we apprehend that it is true that the criminal laws of one State cannot be enforced in any other State. But suppose the Indiana statute had given the woman a right of action for damages, and there was a similar statute in this State. We are not prepared to say that an action could not have been brought by the woman under the Indiana statute in this State, and a recovery obtained, unless a different policy had been adopted by this State.

It seems to us to be entirely immaterial what the Illinois statute is called. Just as valuable rights may be conferred under a statute

Fitzgerald v. Arel.

which is enacted under what is known as the police power, as if passed because of the inherent power of the State. After all, statutes of all kinds and on all subjects are enacted under and by virtue of the sovereign power of the State. And if private rights are thereby conferred, why should we stop and inquire under or by what right the statute was enacted, unless it is unconstitutional? The mere fact that the statute was passed under what is known as the police power is not a sufficient reason in our judgment why a private right conferred thereby should not be enforced in this State to the same extent as any other statute. It will be conceded for the purposes of this case, that the statute in question was enacted under the police power of the State, and that if it was not in accord with but was contrary to the public policy of this State as expressed in the statutes thereof, then it cannot and should not be enforced, even for the protection of a private right, in our courts. But as it accords with the policy and statutes of this State, we are unable to see why it should not be enforced.

[Omitting other matters.]

Judgment reversed.

 FITZGERALD V. AREL.

(63 Iowa, 104.)

Statute — "residence" — domicile.

Where one rents and keeps a house with his family in one county, designing to remain until he has completed a certain job, he becomes an "actual resident" there, although he has a domicile in another county, whither he intends to return on the completion of the job.

ACTION on a due-bill. The opinion states the case. The defendant had judgment below.

John Jensevold, Jr., for appellant.

C. E. Cohoon, for appellee.

ADAMS, J. Three questions are certified, but as the determination of one of them will make a final disposition of the case, we deem it sufficient to determine that one. The question is in these

words : " Upon the affidavit as to residence, is defendant a resident within, and subject to, the jurisdiction of the justice of the peace before whom the case was brought?"

The jurisdiction of justices of the peace, when not specially restricted, is co-extensive with their respective counties. Code, § 3507. This provision is qualified by the exception that their jurisdiction " does not embrace suits for the recovery of money against actual residents of any other county." In determining whether the justice of the peace in the case at bar had jurisdiction, we have to determine whether the defendant was an actual resident of any other county. He contends that he was an actual resident of Des Moines county. His theory that he was such resident is not based upon the fact that either he or his family was actually living in Des Moines county at that time (for the affidavit shows that they were living in Palo Alto county), but upon the fact that they intended, when defendant's contract should be completed, to return to Des Moines county. Whether the word " resident," as used in the statute in question, should have precisely the same meaning as in statutes providing for the settlement of paupers, or for the exercise of the right of suffrage, or for taxation, we need not determine. In the statute in question, the word " actual" is used to qualify the word " resident," and besides the manifest object of a statute may often be allowed some influence in its construction.

Proceeding then with our inquiry, we have to say that it does not necessarily follow that the defendant was an actual resident of Des Moines county because his domicile was in that county. Residence and domicile are not necessarily the same. 2 Kent Com. 431, note; *Love v. Cherry*, 24 Iowa, 204; *Cohen v. Daniels*, 25 Iowa, 88. In the latter case, BECK, J., said : " The distinction between the import of the terms " residence" and " domicile" is obvious. The first is used to indicate the place of dwelling, whether permanent or temporary ; the second, to denote a fixed, permanent residence to which, when absent, one has the intention of returning." The distinction here noted is the same as is sometimes made between actual residence and legal residence or inhabitancy. In *Crawford v. Wilson*, 4 Barb. 522, the court said : " The actual residence is not always the legal residence or inhabitancy of a man. A foreign minister actually resides, and is personally present, at the court to which he is accredited, but his legal residence or inhabitancy and domicile are in his own country." See also, in

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this connection, *Shelton v. Tiffin*, 6 How. 185, and 2 Pars. Cont. 578. In our opinion, whenever a man buys or hires a house and sets up house-keeping with his family, with the design of remaining there until he has completed a certain job of work, he becomes an actual resident of that county within the meaning of the statute in question, and that too notwithstanding his domicile may be in another county, to which he intends to return upon the completion of the job. The object of the statute depriving justices of the peace of jurisdiction over the actual non-residents of the county, was doubtless to secure persons against annoyance from suits where they could not conveniently remain to defend. But this reason cannot be presumed to apply, where a person is sued in a county in which he has set up house-keeping with his family.

We are aware that it was said in *Love v. Cherry*, above cited, that the plaintiff might have two residences at the same time, a residence in Iowa and a residence in Texas, and it was held that she might be sued before a justice of the peace in the county of her residence in Iowa, while actually in Texas. It has been frequently said that a person may have more than one residence, and we have seen that a person may have an actual residence in one place and a legal residence in another. *Crawford v. Wilson*, above cited. But it is certain that if in *Love v. Cherry*, Mrs. Love had an actual residence in Texas, she could not be sued before a justice of the peace in Iowa, because that would have been in express contravention of the statute. If Mrs. Love then was supposed to have had a residence in Texas, it could not have been supposed to have been an actual residence within the meaning of the statute. The fact appears to be that Mrs. Love had purchased a dwelling-house at the place of her Iowa residence, to-wit, Mount Pleasant, and had moved into it with her daughter and her daughter's family, with whom she lived. She went to Texas on business, leaving behind her her furniture, a part of her clothing, and the family of which she had become a member, and intended to return. So far, it would seem to be clear that her actual residence remained at Mount Pleasant. The only evidence tending to show otherwise was her testimony that while in Texas, she took out letters of administration upon an estate, and in order to do so, she was obliged to "take up her residence there." But her design of returning does not seem to have been abandoned. That case differed from the one at bar in this, that the family to which Mrs. Love had attached herself as a

member, and her furniture, and part of her clothing, remained behind her at her Iowa residence. Service of original notice in the case was made upon her by a service upon her daughter, as a member of her family, being the family to which she attached herself at Mount Pleasant. In the case at bar, the defendant took his family with him. We think that this case is not controlled by *Love v. Cherry*, and that the court below erred in holding that the justice of the peace did not have jurisdiction.

Judgment reversed.

SUPPLEMENTAL OPINION.

The appellee, in a petition for rehearing, calls our attention to *Bradley v. Fraser*, 54 Iowa, 289, and insists, that while the facts in that case are not precisely like the facts in this, the difference is not such as to justify a difference in ruling.

The specific question to be determined is, as to whether the defendant was an actual resident of Des Moines county or of Palo Alto county. It is not easy perhaps to lay down a rule by which it can be determined in all cases whether a person is an actual resident of a given county, when it is conceded that he has a legal residence in another county. But if a person who, having a legal residence in one county, goes into another, and there hires a house and sets up house-keeping therein with his family, with the intention of remaining there until he has completed a certain job of work, does not become an actual resident of the latter county, it would be difficult to suppose a case of actual residence in one county, where the legal residence is in another. The appellee does not contend that we should put a construction upon the statute which would eliminate the word "actual," and make a person suable before a justice of the peace only in the county where he can vote; yet his reasoning would lead to such result; and it is difficult to see how he could affirm this case without substantially so holding. But we must allow force to be given to every word of a statute, so far as it can be done consistently; and it not only can be done in this case, but as we have already seen, there is a manifest reason for the use of the word "actual." The case of *Bradley v. Fraser* differs from the case at bar in this, that Bach, whose residence was drawn in issue, was not keeping house, but boarding at a hotel. It is true that he had been keeping house, but he had given it up. Whether he was preparing to keep house or not

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does not appear, and it is not material. Any one can see that that case is distinguishable from this. His arrangement for remaining where he was sojourning was of a more temporary character. In the opinion in that case, it is true some stress was placed upon the fact that Bach was a voter in Buchanan county. But while that was not of itself a controlling circumstance, it was entitled to be considered. Bach's legal residence being established in the neighboring county of Buchanan, his actual residence could not be held to be in Clayton county, without such showing of facts as would properly lead to the conclusion that his actual and legal residence differed. The fact that he was sojourning at a hotel, though he had his family with him, did not lead us to such conclusion. We do not say that a hotel boarder might not, where boarding, have an actual residence as distinguished from a legal residence. His engagements, and the distance from his place of legal residence, might be such as to clothe his sojourn with a considerable degree of permanence. Every case must be determined upon its own facts, and with due regard to the object which the statute was designed to accomplish. The petition for a rehearing must be overruled.

FREBURG V. CITY OF DAVENPORT.

(63 Iowa, 112.)

Municipal corporation — surface-water.

A city, bringing its streets to grade, and omitting to construct gutters, is not liable, in the absence of negligence, for the overflow of surface water from the street on adjacent lots below grade.

ACTION for injury by surface water. The opinion states the case. The plaintiff had judgment below.

C. M. Waterman, for appellant.

E. F. Richman, for appellee.

SEEVERS, J. After stating that the plaintiff is the owner of certain real estate situate within the city, the petition proceeds as follows:

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"That petitioner's house is located on east end of said premises, and fronting on Mississippi avenue; that a ravine runs through said premises from north to south, and west of, and lower than the foundations of plaintiff's house, which at the time of plaintiff's purchase of said premises and for a long time thereafter, afforded an outlet for the surface water falling on the streets and properties north of the plaintiff's said premises; that the city, by its street commissioner, officers, agents and employees, by filling Fourth street across the said ravine, north of the petitioner's said property, and by cutting and filling the said Mississippi avenue, have so diverted the said surface water from its natural courses and outlets that all of such surface water, falling and collecting on a large area of ground, north of plaintiff's said premises, does and must flow down on the western side of Mississippi avenue and in front of plaintiff's premises; and the said city, by its said agents and employees, has undertaken to conduct said water down and along the west side of Mississippi avenue, in gutters and pretended gutters constructed for that purpose, at a high grade, and considerably above the floors and foundations of plaintiff's said house; that the work so done by said city on said Mississippi avenue, in the first instance, was only partially in accordance with the grade legally adopted and established on said street by said city; that thereupon petitioner made application to the city council to have the ground prepared in front of his said premises for a sidewalk, to serve, at least, as a partial protection against the flood turned into his front door, but the said city refused and neglected to entertain his said petition; that thereupon petitioner at great expense raised his house to conform to the then actual grade of the street, and filled in ground between his house and said gutter, and constructed a heavy stone wall of some ten or twelve feet in height to protect his said premises, but he had hardly completed the said improvements and measures to protect himself and his property before the city, by its officers, agents and employees, again filled the western side of Mississippi avenue in front of his house, and raised the gutter some two or three feet higher, so that the water could flow over the barriers plaintiff had endeavored to interpose.

"The plaintiff shows that the gutter and pretended means adopted for carrying off and beyond the petitioner's premises the said surface water were, and are, ridiculously inadequate for the purpose, and were so known to be at the time they were constructed; that

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no engineer was consulted respecting the sufficiency of said gutters or ways for said surface water, nor were they constructed with reference to any plan or system, but in utter and willful disregard of the damage that would ensue to plaintiff's property; that for several years last past, the surface water from rains has continuously overflowed the gutters and ways provided for it by said city, to and upon the plaintiff's premises, destroying and washing away his garden and grounds, and has flowed into and through his house and cellar, destroying and weakening its walls and foundation, and rendering a portion of it uninhabitable and untenable, and permanently injuring said house."

The defendant denied the material allegations of the petition, but it was admitted that certain grading was done on Fourth street. The defendant also pleaded that the plaintiff had been guilty of contributory negligence, and that his property is situate in a ravine below the grade of Mississippi avenue; that he failed to raise it to grade, or otherwise protect it from being overflowed; and that the damages sustained were caused by an extraordinary storm.

It will be observed that it is not alleged in the petition that the filling across the ravine on Fourth street was negligently done, nor that its effect was to collect surface water in a pond or reservoir, which was discharged or thrown over or against plaintiff's premises, but that by reason of such filling, surface water was diverted and caused to flow down said avenue, and that because of the insufficiency of the "gutter and ways" provided by the city, surface water has overflowed and damaged the plaintiff's premises.

It will be further observed that the plaintiff's premises are situate below grade, and that he raised his house and built a stone wall to conform to the then actual grade, but that the city changed the gutter by raising it higher, so that the water could overflow the barriers so erected by him. It is not however alleged that the city acted negligently in raising the gutter, or did what they had no right to do.

The evidence tended to sustain the allegations of the petition. It will therefore be assumed, that by the filling done on Fourth street, the surface water was diverted and caused to flow along Mississippi avenue, and that the city failed to provide sufficient gutters on the avenue to carry off the increased flow, and because of this fact, the plaintiff's premises were injured. There is no evidence which tends to show any negligence whatever on the part of the



city, except the failure to provide sufficient gutters or other passage-ways for the escape of the surface water. There is no evidence tending to show that the city purposely or unnecessarily did any thing it should not have done.

Such being the material facts, counsel for the appellant insists that no liability attaches; and several authorities are cited. The rule upon this subject is thus stated in 2 Dill. Mun. Corp. (3d ed.), § 1051: "There will be a liability, if the direct effect of the work, particularly if it be a sewer or drain, is to collect an increased body of water and to precipitate it on the adjoining property to its injury. But since surface water is a common enemy, which the lot-owner may fight by raising his lot to grade, or in any other proper manner, and since the municipality has the undoubted right to bring its streets to grade, and has as much power to fight surface water in its streets as the adjoining private owner, it is not ordinarily, if ever, liable for simply failing to provide culverts or gutters adequate to keep surface water off from adjoining lots below grade, particularly if the injury would not have occurred had the lots been filled up, so as to have been on a level with the street."

The authorities bearing on the above proposition will be found cited in notes to sections 1041, 1042, 1043 and 1044 in 2 Dillon, before cited. We regard the foregoing as a correct statement of the rule supported by the decided weight of authority. *Weis v. City of Madison*, 75 Ind. 241; s. c., 39 Am. Rep. 135. It is not deemed necessary to refer to and comment on the cases referred to by Judge DILLON. The law being as stated by him, the next question is whether this case is brought within the rule. We think it is, without serious doubt. The plaintiff's premises are below the grade of the street, and the defendant simply failed to provide sufficient water ways for the passage of the surface water. The city had the undoubted right to grade the street in such way, time and manner as it saw fit; it had the right to protect itself from surface water, and so had the plaintiff.

That the city had the right to make the fill on Fourth street must of course be conceded. The effect was to divert the surface water down Mississippi avenue. The plaintiff had the right and it was his duty to protect himself from this increased flow. The city had the right to assume that the plaintiff would bring his house and premises to grade, and to construct gutters or waterways under such belief. Under the undisputed facts in this case, we are of

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opinion that the plaintiff is not entitled to recover, and therefore the fourth and other paragraphs of the charge are erroneous.

To the end that we may not be misunderstood we think it proper to refer briefly to certain decisions of this court. In *Livingston v. McDonald*, 21 Iowa, 160, the subject we have been considering, as applied to agricultural land, was largely discussed by DILLON, J., and certain rules, deduced from the civil law, were adopted by the court which may not be in strict accord with the views herein expressed. In the case just cited it was said: "And in so holding we add that we do not lay down any rule applicable to town or city property." The other cases are *Ellis v. Iowa City*, 29 Iowa, 229; *Simpson v. Keokuk*, 34 Iowa, 568; *Russell v. Burlington*, 30 Iowa, 262; and *Bartle v. City of Des Moines*, 38 Iowa, 414. In none of these cases was the question under consideration in this case either presented or determined.

It is not deemed necessary to determine the other errors assigned and discussed by counsel, except to say that we strongly incline to think the tenth instruction should have been given as asked by the defendant, and also that the fourth and fifth instructions asked by the defendant should have been given.

Judgment reversed.

STATE V. CARMAN.

(63 Iowa, 130.)

Criminal law — waiver of jury.

In a criminal case the prisoner may not waive a jury.*

CONVICTION of murder. The opinion states the case.

McNelt & Tisdale, for appellant.

Smith McPherson, attorney-general, for State.

ADAMS, J. The defendant waived in writing his right to a trial by jury. He now insists that he had no power to waive such right.

* See *State v. Kaufman* (51 Iowa, 578), 83 Am. Rep. 148.

In our Code of Civil Practice it is provided that "issues of fact in an action in an ordinary proceeding must be tried by a jury, unless the same is waived." § 2740. In our Code of Criminal Procedure there is no provision for the waiver of a jury. On the other hand, it is provided that "an issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded." § 4350. We regard this provision as excluding the jurisdiction of the court, without a jury, to try such issue. The question presented is not as to the waiver of a mere statutory privilege, but an imperative provision based, as we view it, upon the soundest conception of public policy. Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would when charged with crime, be the one most easily induced to waive his safeguards. There is no resemblance between such a case and that of a person pleading guilty. In the latter case there is no trial, but mere judgment upon the plea.

If the language of the statute were less imperative than it is, the adjudications would support us in reaching the same conclusion. *Hill v. People*, 16 Mich. 351; *State v. Maine*, 27 Conn. 281; *Bond v. State*, 17 Ark. 290; *Wilson v. State*, 16 Ark. 601; *League v. State*, 36 Md. 257; *Williams v. State*, 12 Ohio St. 622; *People v. Smith*, 9 Mich. 193; *United States v. Taylor*, 3 McCrary, 500. We think that the judgment of the District Court must be reversed.

Judgment reversed.

SEEVERS, J., dissenting.

DUFFY V. CITY OF DUBUQUE.

(63 Iowa, 171.)

Municipal corporation — sidewalk — contributory negligence.

The plaintiff, lawfully using a street of the defendant, stepped to a hydrant on an adjacent lot, one or two feet from the street line, to get a drink of water, and while standing with one foot on the lot and the other on the street, some roofing, negligently suffered by the defendant to stand upon the adjacent sidewalk, fell on him and injured him. *Held*, that he might recover.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

D. J. Leshan, for appellant.

Pollock & McNulty, for appellee.

REED, J. The evidence given on the trial establishes the following facts: Tenth street is one of the principal streets in the city of Dubuque. It runs east and west, and is intersected by Locust, a street running north and south. It has been macadamized, guttered and curbed for many years, and there is a brick sidewalk on its north side. There was a frame building situated on the lot in the north-west angle of two streets. The main part of this building stood immediately at the corner, but there was a wing in the rear of the main building, extending west along Tenth street, the foundation of the south wall resting immediately inside of the north line of the street. Some two or three weeks before the accident, the owner of this property, in making some improvements about the premises, had torn this wing down. The workmen who did the work took the roof of the wing off in sections, and two of these sections were carried onto the sidewalk and stood on their edge, being supported on the side toward the street by a tree, against which they rested. There was piled against them, on the side toward the lot, a portion of the timbers and lumber taken from the part of the building which had been torn down. Afterward, this pile of debris and one of the sections of the roof were removed.

* To same effect, *Kiley v. City of Kansas* (69 Mo. 102), 33 Am. Rep. 491.
See *Murray v. McShane* (52 Md. 217), 36 Am. Rep. 367.

The section which remained was about eighteen feet long by fourteen feet wide, and when the other section and the pile of debris were removed, it had no support whatever on the side toward the lot. There was a hydrant standing on the lot, about eight feet in the rear of the main portion of the building, and from one to two feet from the line of the sidewalk. Plaintiff is a plasterer, and he and his partner had been employed to do a job of plastering on the building. On the day of the accident, he went to the building in company with a teamster, with a load of material, scaffolding and tools, to be used in doing the work. After they had unloaded the stuff from the wagon, plaintiff went into the house and got a vessel, and he and the teamster went to the hydrant for the purpose of getting some water to drink, going along the sidewalk from a door on the south side of the building. Plaintiff drew some water from the hydrant in the vessel, and handed it to the teamster, who took a drink, handed the vessel back to plaintiff and immediately left. Plaintiff turned to the hydrant for the purpose of drawing water for himself, and while in the act of doing this, and when stooping over, with one foot on the ground near the hydrant, and the other on the sidewalk, the section of roof was blown over by a gust of wind, falling on plaintiff, and inflicting the injuries of which he complains.

Many of these facts were not disputed on the trial, and the verdict of the jury is conclusive as to such as were controverted.

The defendant asked the court to give the following instruction :

"If the jury find from the evidence that at the time of the accident, the plaintiff was at the hydrant which stood inside the lot, with one foot on the lot and the other on the sidewalk, then he would not be a traveller on the street, in contemplation of law, and cannot recover against the city in this action."

The court refused to give this instruction, and on its own motion gave the following : "The plaintiff must further establish by a preponderance of credible testimony, in order to entitle him to a verdict against the said city, that when he sustained the injuries complained of, he was still in part upon the sidewalk of said city, as he cannot recover, if the accident causing said injuries occurred after he had wholly left said sidewalk and entered the lot where the hydrant was situated."

Appellant assigns the giving of this instruction, and the refusal to give the one asked, as error. The position of counsel for appel-

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lant is, that to entitle plaintiff to recover, he must have been using the street at the time of the accident, for some of the ordinary and legitimate objects for the promotion of which the city is required to keep it in repair, and that the act he was doing at the time is not of that character. The following cases are cited as sustaining this position : *Stinson v. Gardiner*, 42 Me. 248 ; *Slickney v. Salem*, 3 Allen, 374 ; *Blodgett v. Boston*, 8 Allen, 237 ; *Norristown v. Moyer*, 67 Penn. St. 355 ; *Sykes v. Pawlett*, 43 Vt. 446 ; s. c., 5 Am. Rep. 295.

The rule in the New England States, and in some others, undoubtedly is, that the public corporation which is charged with the duty of keeping the highway in repair is liable to one who is injured by its failure to perform that duty, only in case the injury is received while in the legitimate use of the highway. In those States however the duty to keep the highway in repair is imposed on the corporation by statute, and the extent of that duty is expressly defined by statute. The liability of the corporation to one who suffers an injury, by reason of its failure to perform the duty, is also created and defined by statute. The Massachusetts cases cited are determined under statutes which impose upon the corporation the duty of keeping all highways within its limits in such state of repair that they may at all seasons of the year be safe and convenient for travellers passing along and upon them, and which make it liable to any person who suffers an injury through any defect or want of repair therein ; and they hold that unless the person injured by the defect was a traveller on the highway, within the meaning of the statute, when he received the injury, the corporation is not liable to him therefor. They however put a very liberal construction on the word "travellers," as used in the statute. It is held to include every one who has occasion to pass over the highway for any purpose of business, convenience or pleasure, and "that the highway is to be kept safe and convenient for all persons having occasion to pass over it while engaged in any of the pursuits or duties of life." *Blodgett v. Boston*, *supra*.

Now we feel that we are not called upon to determine in this case whether the rule in this State, as to the liability of the corporation, is any different from what it is in those States, by reason of the fact that it is not created or defined by statute — a question discussed by counsel ; for it seems to us that the use which plaintiff was making of the street at the time of the injury was a legiti-

mate and proper use. He was on the street in the ordinary course of his business. He had the right to go to the hydrant for the purpose for which he went there, and in going there, he had the right to pass along the street. It was convenient for him to stand upon the sidewalk while drawing the water. It was certainly not unlawful for him to stand there for that purpose. He was not a mere loungeer on the street, obstructing the travel thereon, but his stopping there for the time and for the purpose for which he stopped was a mere incident to the general use which he was making of the street at the time.

[Omitting other questions.]

Judgment affirmed.

DRAKE V. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

(88 Iowa, 308.)

Railroad — obstruction of surface water.

Where a railway embankment obstructs and turns the surface water on to the land of an adjacent owner, through whose premises the railway goes, the owner may recover damages therefor, although he has received compensation for the taking of the land for the right of way.*

ACTION for injury by surface water. The opinion states the case. The plaintiff had judgment below.

M. A. Low, for appellant.

H. B. Hendershot and Sloan, Work & Brown, for appellee.

ADAMS, J. The road was constructed in 1870 by the Chicago & Southwestern Railway Company. The defendant in 1872 succeeded to the rights of that company. At the time the road was constructed, the land in question was owned by the plaintiff's grantor. The plaintiff became the owner in 1874. From the time of the construction of the road in 1870 to 1876, no damage appears to have resulted to the land in question. In the latter year the plain-

*See *Little Rock, etc., Ry. Co. v. Chapman* (39 Ark. 463), 43 Am. Rep. 260; *Louisville, etc., R. Co. v. Hays* (11 Lea, 382), 47 Am. Rep. 291.

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tiff began to complain. Soon afterward the defendant constructed a ditch along its right of way from the plaintiff's land to an opening in the road where the same was constructed upon trestle work. This ditch was reasonably successful as a drain until 1880, when it became obstructed by accumulated dirt and other matter, and while the defendant made some effort to remove the obstructions, they were not in fact sufficiently removed, and during the cropping seasons of 1880 and 1881, water accumulated upon the plaintiff's land, being prevented primarily by the embankment from escaping, and not afforded a sufficient outlet by the ditch. Certain crops were destroyed, and a portion of the land was rendered wholly untillable. The defendant contends that it did not become liable for any damages, and that if it did, this action is barred by the statute of limitations, and furthermore, that the court mistook the proper measure of damages, and allowed improper evidence to be introduced.

The first question which presents itself is as to whether the defendant owed the plaintiff any duty in respect to the surface water. The court below thought that it did. It gave an instruction in these words: "In my judgment a railroad company is under legal obligation in constructing its railroad through the country, in crossing farms and land generally, to so construct its embankment as not to flow surface water back upon the land through which it passes. I do not think that the common law with reference to the right of owners of town lots or other lands to fight surface water from them can justly be made to apply to railroad companies."

The general doctrine relied upon by the defendant, to the effect that every land-owner has the right to exclude surface water from his premises, was fully recognized in *O'Connor v. Fond du Lac, Amboy & Peoria Railway Company*, 52 Wis. 526; s. c., 38 Am. Rep. 753, and held to apply even to railroad companies. The court in that case said: "The company has only obstructed a ditch which drained or carried off surface water from the plaintiff's premises. We do not think that the defendant was bound to keep that ditch open on its own land for the convenience of the plaintiff; in other words, the owner of land is under no legal obligations to provide a way for the escape of mere surface water coming onto his land from the land of his neighbor, but has the right to change the surface so as to interfere with or obstruct the flow of such water." In *Gunnun v. Hargadon*, 10 Allen, 106, a case between adjacent land-

owners, the court said: "The right of the owner of land to improve and occupy it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his land is so situated with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and showers falling on its surface, or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow." See also in this connection, *Parks v. Newburyport*, 10 Gray, 28; *Wilson v. Mayor*, 1 Denio, 595; *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278; s. c., 38 Am. Rep. 139; *Barkley v. Wilcox*, 86 N. Y. 140; s. c., 40 Am. Rep. 519; *Morrison v. R. Co.*, 67 Me. 353; *Lynch v. Mayor*, 76 N. Y. 60; s. c., 32 Am. Rep. 271; *Taylor v. Fickas*, 64 Ind. 167; s. c., 31 Am. Rep. 114; *Swelt v. Cutts*, 50 N. H. 439; s. c., 9 Am. Rep. 276; *Gibbs v. William*, 25 Kans. 214; s. c., 37 Am. Rep. 241; *Grant v. Allen*, 41 Conn. 156.

As holding a different doctrine, the plaintiff cites *Ogburn v. Connor*, 46 Cal. 346; *Tootle v. Clifton*, 22 Ohio St. 247; *Porter v. Durham*, 74 N. C. 767; *Gillham v. Madison Co. Ry. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 158; *Toledo, W. & W. Ry. Co. v. Morrison*, 71 Ill. 616; *Livingston v. McDonald*, 21 Iowa, 160; *Cornish v. C., B. & Q. Ry. Co.*, 49 Iowa, 378; *VanOrsdol v. B. C. R. & N. Ry. Co.*, 56 Iowa, 470.

In the case last cited the court held that a railroad company could not be allowed to obstruct a natural channel of water. In *Livingston v. McDonald*, the court held that the owner of the higher land could not be allowed to collect water and precipitate it in increased quantities upon the land below, to the injury of such land. The question as to whether a land owner can be allowed, by changing the surface of his land or erecting improvements thereon, to prevent the escape of surface water from adjacent land, where the same did not flow through any natural channel, has never been determined by this court; and we have to say that it appears to us that such question does not necessarily arise in the case at bar. The cases cited arose between adjacent owners.

There is no evidence that the defendant owns the land which it occupies with its road. Its right was probably that of an easement.

It is not claimed by the plaintiff that the defendant is a mere trespasser, and in the absence of any averment or evidence to that effect, we could not assume that it is. The parties have proceeded upon the theory that the defendant's occupancy is rightful. In the absence then of evidence as to the extent of the defendant's right in the premises, we may assume that it is sufficient to make its occupancy rightful, and we cannot assume more. We may proceed then upon the theory that the defendant has an easement. The plaintiff's testimony shows that the railroad crosses his land, and we find no evidence to the contrary. The defendant's estate then appears not only to be an easement, but it is one to which the plaintiff's estate is the subject or servient estate. The easement, we may assume, was acquired by proceedings for condemnation under the statute, or by purchase, and it matters not which.

The important question is as to what the defendant or its grantor, the original owner of the easement, must be presumed to have paid for. In *Stodghill v. C. B. & Q. Railway Company*, 43 Iowa, 26; s. c., 22 Am. Rep. 211, it was held that the defendant paid for what the commissioners should properly have considered in their estimate, and among the things was not included the right to divert a natural stream of water. On the other hand it is to be observed that in *Sabin v. Vermont Central Railway Company*, 25 Vt. 363, it was held that the right of way damages covered the right to cast rock on the adjacent premises by blasting, so far as was necessary in the construction of the road. The draining of wells and the diversion of water courses, it is said, are covered by the right of way damages, where the same are necessary in the construction of the road. *Proprietors of Locks and Canals v. Railroad Company*, 10 Cush. 385. If we could suppose a case where the construction of a railroad would necessarily interfere with the flow of surface water, and cause it to accumulate and stand on the land from which the right of way is taken, the injury that would accrue therefrom should, we think, be considered by the commissioners and embraced in their appraisal of right of way damages. The land owner is entitled to be paid not merely the value of the land taken, but for all incidental injuries which must necessarily result from the proper construction and maintenance of the road. *Kucheman v. C. C. & D. R. Co.*, 46 Iowa, 366; *Inlay v. Railroad Company*, 26 Conn. 249. But the undisputed evidence in the case at bar shows that the drainage of the surface water from the plaintiff's premises

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was easily maintainable by the construction and maintenance of a ditch along the defendant's right of way to its trestle work. The case is not different from what it would have been if the defendant could have effected the drainage by the construction and maintenance of one or more culverts. Where the effect of a mere embankment would be to obstruct the passage of surface water and cause damage to the premises from which the right of way is taken, but sufficient drainage can be easily secured by a ditch or culvert, it appears to us that when the company applies for a right of way, it could not be presumed to be desirous of securing and paying for the privilege of obstructing the passage of the water. Such being our view we could not say that the right to obstruct the passage of the water was included in the right of way damages. The owner then of the premises from which the right of way was taken was paid as we must presume, upon the theory that the company preferred to protect him against this incidental injury. The very enjoyment of the easement therefore carried with it day by day the obligation to furnish this protection. Possibly this would not be so if the evidence showed, or if we could assume that the company acquired the fee simple title to the land which it occupies. Without committing ourselves to an approval of the instruction as a general and unqualified proposition, we have to say that as applied to the facts of this case, it appears to us to be correct.

On another point,

Judgment reversed.

VANHORN V. CITY OF DES MOINES.

(68 Iowa, 447.)

Municipal corporation — liability for inadequate water supply.

A city having undertaken to supply water to extinguish fires, and levied a tax to defray the expense, is still not liable to a tax payer whose property has been burned by reason of an inadequate supply of water, although the water-works company has contracted to indemnify the city against all actions for its misfeasance or neglect.*

* To same effect, *Black v. City of Columbia* (19 S. C. 413), 45 Am. Rep. 785.

ACTION for value of building and contents destroyed by fire. The head-note states the case. The defendant had judgment below.

E. J. Goode, for appellant.

No appearance for appellee.

ADAMS, J. The defendant was authorized by law to provide for the supply of water for the extinguishment of fires, and to levy a tax to defray the expenses. Having undertaken to provide for such supply, and having levied a tax to defray the expenses, the plaintiff contends that the city became liable for a lack of supply, upon the same principle that cities are liable for personal injuries sustained by reason of defective streets and sidewalks.

But the power on the part of a municipal corporation to provide for the accomplishment of certain results does not necessarily impose a liability for their imperfect accomplishment. Even a failure to furnish suitable streets and sidewalks, or to maintain them, does not of itself render the city liable, however much the exigencies of business or the preservation of property may demand them. *Dubuque, etc., Association v. City of Dubuque*, 30 Iowa, 176. The injury sustained must be something more than the lack of facility or means of accomplishing an ulterior result. There are many matters in which municipal corporations have power to provide for the accomplishment of results beneficial to the public, but it would be very unwise to hold them liable for failure to make adequate provisions because in the various emergencies which may arise it would be impossible to know what provision would be adequate. Take the matter of the extinguishment of fires. The provision which a given city should make is a matter of legislative discretion. It may be, and often is, inadequate, but individual sufferers have never been held to have a right of action against the city upon such ground. Probably the plaintiff would not contend that they should. His idea, as we understand it, is, that while it may be a matter of legislative discretion in the outset as to what provisions should be made, and no liability can be predicated upon the improper exercise of such discretion, yet having made a provision, the city is responsible for any misfeasance in carrying it out.

But in our opinion the principle remains the same. The individual sufferer's ground of complaint still is a lack of facility for

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accomplishing an ulterior result. If the city is bound to furnish no particular facility, it seems to us that that is the end of all question of liability for failure. *Tainter v. City of Worcester*, 123 Mass. 311; s. c., 25 Am. Rep. 90; *Wheeler v. Cincinnati*, 19 Ohio St. 19; s. c., 2 Am. Rep. 358. In the matter of the construction and maintenance of streets and sidewalks, the city may well enough be held liable for personal injuries resulting proximately from its misfeasance or neglect. It should not be allowed to create a source of danger to the public.

But it is said that the case at bar is peculiar in this, that the city took a contract from the Water-works Company to protect itself against all actions which might be brought against it for misfeasance or neglect on the part of the company. This indemnity, it is claimed, gives a right of action where otherwise it would not exist. But clearly this is not so. Indemnification against liability must always be regarded as having reference to existing grounds of liability, and not as serving to create new ones. Besides the city could not assume liability for negligence in cases where the law did not already impose a liability. The contract then must be construed as covering cases only where an action might be maintained against the city independently of the contract. We think that the demurrer was rightly sustained.

Judgment affirmed.

FERRIER V. STORER.

(68 Iowa, 484.)

Contract — by letter — notice of acceptance.

To constitute a valid contract by letter, if no time for acceptance of the offer is fixed, it must be affirmatively shown that the acceptance was mailed within a reasonable time and before any intimation of withdrawal was received.*

ACTION on account. The opinion states the case. The defendant had judgment on a counter-claim.

Glass & Hughes, for appellant.

Stanberry & Clark, for appellee.

* See *Macley v. Harvey*, 33 Am. Rep. 35, and note, 40.

ADAMS, J. The first question arises upon an instruction pertaining to interest charged plaintiff by defendant. The interest charged is for \$300, alleged to have been loaned to plaintiff by defendant on the 29th day of May, 1871. The defendant denies the loan. The undisputed fact is that the plaintiff had that sum in his hands at that time, which the defendant had sent him to invest in land. Not finding an immediate opportunity to make such investment, the plaintiff wrote to the defendant, proposing to borrow it and pay him ten per cent interest. The defendant replied, accepting the offer. The plaintiff did not in fact use the money, and it was afterward applied in payment for land purchased by defendant. The plaintiff's position that he did not borrow the money does not rest upon the fact that he did not use it. It rests upon the alleged fact, that notwithstanding the defendant's reply accepting the plaintiff's offer, the acceptance was not fully within the terms of the offer, and in addition that the reply was not made within a reasonable time.

The court seems to have thought that the acceptance was sufficiently within the terms of the offer, and while it seems to have had some doubt as to whether the reply was made in time to necessarily constitute a contract, it held that it did so, unless the plaintiff immediately upon the receipt thereof notified the defendant that he had withdrawn his offer. The instruction given is in these words: "The letters given in evidence, one from plaintiff to defendant, proposing to defendant to use defendant's money in plaintiff's hands and allow him interest at the rate of ten per cent, and the other from defendant to plaintiff, accepting the proposal, or consenting to plaintiff's use of the money, if written by the respective parties, would constitute a written contract between them as to that matter, binding on both, unless the plaintiff, immediately on the receipt of the defendant's letter, gave notice to the defendant that he had withdrawn his offer, or declined to accept the money as a loan." The giving of this instruction is assigned as error.

The plaintiff's letter containing his offer bears date, "Lincoln, May 1, 1871." The offer is in these words: "I want to say to you, if you was coming out here in the fall, I will use your money until you come, and give you ten per cent for it. I have a payment to make on my place before a great while, and it will accommodate me until after harvest. Please let me know as soon as you find it convenient." The defendant in his answer, dated, "Depere, Wisconsin,

sin, May 29, 1871," said : " You spoke of the money I sent being useful to you for making a payment on your place. You can use it for that purpose on your own terms mentioned in your last, as I have no other use for it, but I do not like it to lie idle, as it does not pay."

The position taken by plaintiff, that the acceptance was not made within the terms of the offer, rests upon the fact that the offer contains the words : " If you was coming out here in the fall," and the acceptance makes no reference to such condition. To this we have to say that it does not appear to us that we can give the words the force of a condition. They seem to have been used rather as an introduction to, or reason for, the plaintiff's proposal, and not as essentially concerning any object which the plaintiff was desiring to secure. In our opinion the acceptance was substantially within the terms of the offer.

In the instruction the court ruled, in effect, that the acceptance became binding upon the parties, unless the plaintiff immediately notified the defendant that he had withdrawn his offer. The rule now supported by the great preponderance of authority, and almost, if not quite universally adhered to, is that when a proposal is accepted by letter, the contract is deemed to become complete when the letter is mailed, provided the offer is standing, and the acceptance is made within a reasonable time. *Moore v. Pierson*, 6 Iowa, 292 ; *Mactier v. Frilh*, 6 Wend. 103 ; s. c., 21 Am. Dec. 262 ; *Brisban v. Boyd*, 4 Paige, 17 ; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390 ; *Hallock v. Ins. Co.*, 2 Dutch. 288 ; *Adams v. Lindsell*, 1 B. & Ald. 681 ; *Potter v. Sanders*, 6 Hare, 1. The contract is deemed complete when the letter is mailed, because the mailing constitutes the overt act by which the acceptance is manifested. In *Hallock v. Ins. Co.*, above cited, VRENDENBURGH, J., speaking of the overt act by which acceptance is manifested, said : " The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph * * *. The acceptor can no more overtake and countermand his letter mailed than he can his words of acceptance after they have issued from his lips." And he adds : " The bargain, if struck at all, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance, or the instrument itself, intended for the other party, is certainly such overt act." Such we believe to be the well recognized doctrine as to the point of time

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when a contract made by correspondence is deemed complete. It will be seen that the rule is sharply defined. The instruction given seems to us to be a departure from it. It assumes that the contract in the case at bar was not necessarily complete when the letter of acceptance was mailed, and that no contract would have been made, if the plaintiff immediately upon the receipt of the letter had notified the defendant that the offer was withdrawn. The departure from the recognized rule must have been deemed called for upon the ground that the letter of acceptance was not mailed within a reasonable time. The court doubtless assumed the rule to be, that a contract by correspondence is not completed by the mailing of the letter of acceptance, where that is not done within a reasonable time. In this the court was unquestionably correct. In *Benj. on Sales*, § 44, note, it is said: "The answer of acceptance must be placed in the post-office within the time limited, if any, or otherwise with reasonable dispatch, and before any intimation is received that the offer is withdrawn." In support of the rule, the annotator cites *Potts v. Whitehead*, 5 C. E. Greene, 55; *Abbott v. Shepard*, 48 N. H. 14; *Stockham v. Stockham*, 32 Md. 196. See also, *Craig v. Harper*, 3 Cush. 158; *Johnston v. Fessler*, 7 Watts, 48; s. c., 32 Am. Dec. 788. The rule we believe to be recognized by implication by many other authorities. Taking this to be the rule, we have to inquire whether an acceptance after the time limited, or in the absence of an express limitation, after the lapse of a reasonable time, imposes upon the person making the offer any obligation. The theory of the court below seems to have been that it does. But in our opinion it does not. The offer, unless sooner withdrawn, stands during the time limited, or if there is no express limitation, during a reasonable time. Until the end of that time the offer is regarded as being constantly repeated. *Chitty on Const.* (11th ed.) 17. After that there is no offer, and properly considered, nothing to withdraw. The time having expired, there is nothing which the acceptor can do to revive the offer, or produce an extension of time.

There remains only to be considered whether the error in the instruction is such that we could regard it as without prejudice. If the undisputed facts showed that the letter of acceptance was mailed within a reasonable time, then the error would be without prejudice. The contract would have been proved, and the defendant would have been entitled to an instruction even more favorable to him than that of which the plaintiff complains.

when it becomes, by reason of the travel thereon, or other causes, rounded or in ridges, then it may be that the city should be required to remove such ice and snow.

Judgment reversed.

JOHNSON V. MILLER.

(53 Iowa, 529.)

Malicious prosecution — probable cause — disagreement of jury.

In an action for malicious prosecution, the disagreement of the jury upon a criminal prosecution is *prima facie* evidence of probable cause.

MALICIOUS prosecution. The head-note states the case. The plaintiff had judgment below.

Horace Boies and Hubbard, Clark and Deacon, for appellants.

C. E. Wheeler and Piatt & Carr, for appellees.

SEEVERS, J. [Omitting other points.] As has been said, the plaintiff was twice tried on the criminal charge. On the first trial the jury were unable to agree on a verdict, and were discharged. The defendants sought to introduce in evidence the record of such trial, which showed that the jury retired to consider as to their verdict on the fifth day of May, and being unable to agree, they were discharged the next day. Upon the objection of the plaintiff, this evidence was excluded. It is insisted by counsel for the defendants that the evidence sought to be introduced was evidence of probable cause, and therefore the court erred in excluding it.

It has been held that a conviction before a justice of the peace on a criminal charge, and an acquittal upon appeal, is conclusive evidence of probable cause. *Whitney v. Peckham*, 15 Mass. 243; *Witham v. Gowen*, 14 Me. 362. In *Bacon v. Towne*, 4 Cush. 217, it is said that the authority of the first case has been doubted in *Burt v. Place*, 4 Wend. 591, and that if the conviction before the justice is regarded "as evidence of probable cause, we think it is *prima facie* only, and not exclusive," and such is the rule in this State. *Moffatt v. Fisher*, 47 Iowa, 473. In *Garrard v. Willel*, 4 J. J. Marsh. 629, it was held "that the finding by the grand jury (of an

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Williamson & Kavanaugh, for appellant.*Finch & Donovan*, for appellee.

SEEVERS, J. The building material, placed as it was, did not cause the accident, but it was caused by the ice and snow which had accumulated in the street. The building material, at most, caused the ice and snow to accumulate. The city did not have express notice of such accumulation, nor that the street was in a dangerous condition. A material question on the trial therefore was whether the snow and ice had so accumulated as to render the street dangerous to persons passing over it. In a lengthy instruction, the court defined the duty of the city in such cases, and among other things said that "such care requires that accumulations of ice and snow, dangerous to travel, should be removed within a reasonable time after the officials of the city charged with the care of the streets had knowledge thereof, or by the exercise of ordinary diligence should have known it, and the city is not negligent until such reasonable time has elapsed."

[Omitting the question of notice.]

We deem it proper, in view of another trial, to say that the instruction above quoted does not in our opinion state the law correctly. The test of liability under the instruction is whether the street was in a dangerous condition caused by the accumulation of ice and snow. Such an accumulation may occur in a few hours; or because of a fall of rain which freezes as it falls, the street of a city may become, and frequently are in this climate, coated with ice, thus rendering them dangerous to travellers. The city in such case would have the requisite notice, and under the instruction would be bound to remove it within a reasonable time. To so require would prove a great burden, and we think that the better rule is that it is only when "ice or snow is suffered to remain upon a sidewalk (or street crossing) in such an uneven and rounded form that a person cannot walk over it, using due care, without danger of falling down, that it seems to constitute a defect for which the city or town is liable." *Cook v. Milwaukee*, 24 Wis. 274; s. c., 1 Am. Rep. 83. The mere fact that a street is in a dangerous condition, because of ice and snow, rendering the walks and crossings slippery by reason of the operation of natural causes, should not render the city liable, even if such ice and snow are not removed in a reasonable time. But

when it becomes, by reason of the travel thereon, or other causes, rounded or in ridges, then it may be that the city should be required to remove such ice and snow.

Judgment reversed.

JOHNSON V. MILLER.

(83 Iowa, 529.)

Malicious prosecution — probable cause — disagreement of jury.

In an action for malicious prosecution, the disagreement of the jury upon a criminal prosecution is *prima facie* evidence of probable cause.

MALICIOUS prosecution. The head-note states the case. The plaintiff had judgment below.

Horace Boies and Hubbard, Clark and Deacon, for appellants.

C. E. Wheeler and Piatt & Carr, for appellees.

SEEVERS, J. [Omitting other points.] As has been said, the plaintiff was twice tried on the criminal charge. On the first trial the jury were unable to agree on a verdict, and were discharged. The defendants sought to introduce in evidence the record of such trial, which showed that the jury retired to consider as to their verdict on the fifth day of May, and being unable to agree, they were discharged the next day. Upon the objection of the plaintiff, this evidence was excluded. It is insisted by counsel for the defendants that the evidence sought to be introduced was evidence of probable cause, and therefore the court erred in excluding it.

It has been held that a conviction before a justice of the peace on a criminal charge, and an acquittal upon appeal, is conclusive evidence of probable cause. *Whitney v. Peckham*, 15 Mass. 243; *Witham v. Gowen*, 14 Me. 362. In *Bacon v. Towre*, 4 Cush. 217, it is said that the authority of the first case has been doubted in *Burt v. Place*, 4 Wend. 591, and that if the conviction before the justice is regarded "as evidence of probable cause, we think it is *prima facie* only, and not exclusive," and such is the rule in this State. *Moffatt v. Fisher*, 47 Iowa, 473. In *Garrard v. Willet*, 4 J. J. Marsh. 629, it was held "that the finding by the grand jury (of an

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indictment) is *prima facie* evidence of probable cause." In *Smith v. McDonald*, 3 Esp. 7, it is said that if the evidence on the trial of the criminal charge is such as to cause the jury to hesitate as to an acquittal, it is evidence of probable cause.

In the case at bar, the jury were unable to agree as to the innocence or guilt of the defendant. It followed, of course, that the jury, or some of them, must have believed the plaintiff to be guilty. The fact that he was acquitted by another jury cannot affect the result which must necessarily follow because the first jury failed to acquit. We think the evidence offered was admissible, because it tended to show probable cause. It was not conclusive, and like any other *prima facie* evidence, was subject to be explained. The question is not whether the plaintiff was guilty, but whether the defendants had reasonable cause to so believe. If the finding of an indictment is evidence of probable cause, or the evidence on the trial of the criminal charge is such as to cause the jury to hesitate is evidence of probable cause, it seems to us that the inability of the jury to agree must have the same effect. The evidence offered was therefore admissible.

Judgment reversed.

VAN SANDT V. DOWS.

(83 Iowa, 594.)

Set-off — estoppel.

An obligor may plead a set-off, although he has given a bond to secure the payment of the cause of action, not reserving the right of set-off.

ACTION on a bond. The opinion states the case. The defendant had judgment below.

McKerwin Bros. and *Hepburn & Thummel*, for appellant.

Stuart Bros. and *W. W. Morseman*, for appellees.

ADAMS, J. [Omitting other questions.] But it is claimed that the defendants' liability arose upon their bond, and must be determined by the terms of the bond, and that being so determined, it cannot be held to be subject to the right of set-

off. The bond obligated the defendants "to pay the said Webster all sums due or to become due from them to him as such assignee, or to said Porter, on said contract, as compensation or profits." The bond did not create a new liability. Its office was to secure the performance of the one already existing. The defendants owned the corn, and were under obligations to sell it and pay the stipulated compensation or profits. The assignee sought and obtained security that this would be done. It was not necessary, we think, to reserve in the bond the right of set-off in order to preserve it. Possibly it would have been, if the office of the bond had been to create a new liability, but we are unable to discover upon what principle we should regard it necessary, if as we hold, the bond was designed merely as security. But it is said that Porter was not in fact indebted upon the accounts pleaded by way of set-off. To this we have to say that the answer avers that he was, and the question presented arises upon demurrer to the answer. In our opinion the demurrer was properly overruled.

Judgment affirmed.

STATE V. CHATBURN.

(68 Iowa, 659.)

Office and officer — vacancy — removal.

Under a constitutional provision that persons appointed to fill vacancies in office shall hold until the next general election and the qualification of their successors, a board of supervisors may not remove at pleasure one whom they had appointed to fill a vacancy in the office of sheriff.

ACTION to test right to office. The head-note states the case. The plaintiff had judgment below.

J. E. Weaver and Platt Wicks, for appellant.

Beard & Myerly, for appellee.

REED, J. The board of supervisors adopted the order for the removal of the relator from the office, without any formal charge or complaint having been preferred against him. It does not appear that he had any notice of the proceeding until after the order

was adopted, nor does it appear upon what ground or for what cause the board assumed to remove him. We will assume then that the board proceeded on the theory that they had the power and right to remove him from the office at their pleasure. Indeed the claim here urged in support of their action is, that having appointed him to the office, the power to remove him therefrom at their pleasure is conferred upon the board by section 787 of the Code. The section is as follows: "A person appointed as herein contemplated may be removed by the officer appointing. And no person can be appointed who has been removed from office within one year."

It occurs in the chapter of the Code which relates to vacancies in civil offices, and to the manner in which such vacancies are to be filled. It is provided in the preceding sections of the chapter, that an office becomes vacant on the happening of either one of a number of enumerated events, before the expiration of the term of such office, and that vacancies in any of the county offices are to be filled by the board of supervisors. Whatever powers then are conferred by the section with reference to the removal from office of a person who has been appointed to fill a vacancy in the office of sheriff, are to be exercised by the board of supervisors.

The single question presented by the record is, whether the board had the power to remove the relator from the office in the manner in which they attempted to remove him and we have to say that in our opinion they possessed no such power.

The tenure of office of persons appointed to fill vacancies in office is prescribed and defined by section 6 of article 11 of the Constitution of the State. This section is as follows: "In all cases of election to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term, and all persons appointed to fill vacancies in office shall hold until the next general election, and until their successors are elected and qualified."

It seems to us that there can be no doubt or dispute as to the meaning and effect of this language. The section explicitly defines and prescribes the term of office of a person who is appointed to fill a vacancy in an office.

When the relator was appointed to fill the vacancy occasioned by the death of Patterson, the term of office which he took by virtue of such appointment extended to the time of the general election

in the year 1883, and until the election and qualification of his successor. The board had no power to appoint for a term either longer or shorter than that. Their only power in the premises was to fill the vacancy. § 783. But when the appointment was made, the term of office of the appointee was prescribed by this section of the Constitution, and he acquired the right to hold and exercise the office and enjoy its emoluments during the whole of such term. The language of the section, that he "shall hold until the next general election," excludes the idea that his term of office can be made to depend on the will or pleasure of those who appointed him to it. It imports rather that he holds the office by a certain title, and for a definite term.

It is not doubted that he accepted the office subject to the right of the State to have him removed for any of the causes which by law are made grounds for the removal from office of a public officer. But these causes for removal are all defined by statute. Section 746. As it is not claimed that the removal was made for any of the causes enumerated in said section, we need not inquire whether the board of supervisors have the power to remove him for those causes. We are well satisfied that they had no power to remove him at their mere pleasure; and as this is the only ground on which they assumed to make the order of removal, it is void. The judgment of the District Court is therefore

Affirmed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

WARD V. WILSON.

(100 Ind. 52.)

Guaranty — notice of default.

A guarantor of a lease is entitled to notice of default, but this is not a condition precedent to an action upon the guaranty, and the failure to give it discharges only to the extent of damage suffered in consequence, and must be pleaded.

ACTION on a guaranty. The opinion states the case. The plaintiff had judgment below.

R. P. Davidson, J. C. Davidson and T. B. Ward, for appellant.

H. W. Chase, F. S. Chase and F. W. Chase, for appellees.

MITCHELL, J. All that need be stated in order to present the question for decision in his record is, that on the 22d day of August, 1876, the appellees leased certain premises in the city of Lafayette to one Telford, at an annual retail of \$600, payable in monthly instalments, for the term of one year, unless they should sell the premises, in which event the tenancy was to expire upon sixty days' notice.

The lease contained a stipulation that the lessee should "surrender the possession of said premises at the expiration of the tenancy in as good condition as they now are, natural wear and decay and unavoidable accidents excepted."

It was further stipulated that the performance of the agreements contained in the lease should be guaranteed to the lessors, and there was the usual stipulation that a failure to pay rent promptly should terminate the lease at the option of the lessors.

Before the lease was delivered there was written upon and delivered with it the following guaranty :

"In consideration of the making of the foregoing lease by Alexander Wilson, Joseph S. Hanna and Henry H. Hanna to James H. Telford, and agreement that security should be given for the performance of the agreements in said lease contained on the part of James H. Telford, I hereby undertake and agree to and with said Alexander Wilson, Joseph S. Hanna and Henry H. Hanna, that said James H. Telford will do and perform all his agreements in said lease by him to be done and performed. Dated Lafayette, August 23, 1876.

"JAMES H. TELFORD,
"WILLIAM L. WARD."

Telford went into possession under the lease, but failed at the end of the year to surrender. The appellees brought suit against him in the Tippecanoe Circuit Court for possession and damages, which resulted in a judgment in their favor for possession, and \$177.10 damages for the detention of the property. Telford then paid the judgment and costs, asked for and obtained a new trial, and the case was again tried on the 27th day of May, 1878, the result being another judgment for possession and \$164.44 damages against him. From the judgment he appealed to the Supreme Court, giving bond to stay proceedings meanwhile, where the judgment of the court below was affirmed February 15, 1881. 71 Ind. 555.

Telford died in July, 1880, before the appeal was determined, his family remaining in possession until May 20, 1881, when the appellees obtained possession.

These facts are set up in a complaint, filed against the appellant on his contract of guaranty above set out, which also charges that "by the failure and refusal of said James H. Telford to surrender the possession of said premises at the end of said term, to-wit, August 23, 1877, * * * the plaintiffs were deprived of posse-

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sion, use and rents thereof, from said 23d day of August, 1877, to the 20th day of May, 1881," which were worth \$2,400, and for which judgment was demanded.

A demurrer to the complaint was overruled, and exception duly taken.

The only question discussed by counsel for appellant relates to the ruling of the court upon the demurrer to the complaint, and no further statement of the case is pertinent, except to say that upon issues made trial was had, which resulted in a judgment for the appellees.

It is earnestly contended on behalf of the appellant, that his contract is one of strict guaranty, collateral to that of his principal, and that no action can be maintained thereon without first giving notice of the default of Telford, and that because notice is not averred in the complaint the demurrer should have been sustained. On the other hand, it is contended with equal emphasis by counsel for the appellees, that the contract was a direct and absolute engagement, binding the guarantor to the same extent as his principal, and that in any event he was liable without such notice.

The distinction between contracts of guaranty and suretyship has been repeatedly and accurately defined, and the nature of the obligation of each is stated with precision and certainty in the books, but as to the circumstances under which a guarantor is entitled to notice of the default of his principal, there is irreconcilable conflict. The confusion mainly grows out of the form in which the contract is expressed, and the subject to which it is applied.

In some instances, a distinction is suggested and made between the case of a contract of guaranty, as applied to a commercial transaction, which is in the form of a letter of credit, or applied to the guaranty of a promissory note, and the case of a contract expressed in substantially the same language, as applied to an ordinary business affair.

The rule in regard to demand of payment and notice of default, as applied to commercial paper, is everywhere regarded as in no sense applicable to guarantors ordinarily. In the case of commercial paper, demand and notice, in order to fix the liability of an indorser or guarantor, are required by an arbitrary rule of the law-merchant; while the rule requiring demand and notice to guarantors, of the character under consideration, rests upon the fact that it is the duty of the guarantee to notify the guarantor of the default of the

principal, with a view of saving him from actual loss which may arise from want of convenient and certain means of knowledge. Outside of commercial paper, no good reason is perceived why the same set of words in a contract of guaranty should mean one thing when applied to one subject-matter, and the same words, expressing the obligation in substance the same, should mean another and different thing when applied to another subject-matter. Wade Notice, § 386. For instance, where the undertaking is entered into originally with the principal and stipulates that a debt shall be paid, or some other act shall be done, it is not perceived why the subject-matter of the contract should, in any such case, be considered in determining the conditions upon which the guarantor, if properly speaking he can be called a guarantor, should be held liable. In all such cases he is liable at once, and without notice, upon default of his principal. In like manner, where the stipulation is to pay the debt or perform the contract of another, absolutely and at all events, whether entered into separately from the other or not, the same effect should in all cases be given to such contracts, and the obligor held liable, without notice of default. Such were the cases of *Frash v. Polk*, 67 Ind. 55; *Kirby v. Studebaker*, 15 Ind. 45; *Kline v. Raymond*, 70 Ind. 271; *Studebaker v. Cody*, 54 Ind. 586; *Cole v. Merchants' Bank*, 60 Ind. 350; *Sample v. Martin*, 46 Ind. 226; *Burnham v. Gallentine*, 11 Ind. 295; *Watson v. Beabout*, 18 Ind. 281.

In cases falling within either of the foregoing classes, neither failure to notify, lapse of time, insolvency of the principal, nor anything less than would exonerate a surety, will discharge a guarantor either wholly or *pro tanto* for the reason that in all such cases his contract is rather in the nature of a contract of suretyship, or a direct original personal undertaking, than that of a guarantor. When however the undertaking is not that the promisor will pay the debt or perform the engagement of another, but that the other will pay or perform, then different considerations are involved; and while it may be laid down as a rule that it is a duty incumbent on the guarantee in all such cases, to give notice to the guarantor of the default of the principal, yet since that rule is founded upon the consideration of affording to the guarantor the means of saving himself from actual loss, by securing indemnity or otherwise, and not upon an arbitrary rule of law, it can not be said that it would be reasonable to hold that the same result must inevitably follow

in such case as in the case of commercial paper, regardless of the fact that the guarantor may or may not have sustained injury by the failure to give such notice.

We are constrained to concur in the statement of an approved author, that "the current of modern American and English authority is against the observance of the distinction predicated simply upon the fact that the sum of the principal's liability actually incurred is uncertain." *Wade Notice*, § 423.

No adequate reason occurs to us for stating it as a rule, that a direct, unconditional agreement to pay for goods which may be delivered to a third person in the future, or the same kind of a contract to do any other thing which another has engaged to perform, may by construction be made conditional upon a notice of the default of such third person.

A direct, original contract, expressed in the same words, should create the same liability under all circumstances and should be enforced in the same manner and upon the same conditions saving only the rights of sureties, whether it be the contract of principal, surety or guarantor, and if notice of future liability is to be relied on, it should be stipulated for in the writing, rather than that the courts should undertake to annex some condition of liability upon an absolute engagement, and where the engagement is not by its terms absolute, but collateral, by which we mean an engagement that some third person will pay a debt or fulfill a contract, since the obligation of the guarantor is not to pay the debt or do the thing contracted for himself, but to answer in damages for the default of his principal, we can see no reason why the character of the thing to be done should dispense with the duty to give notice.

We scarcely need say that no question of notice of the acceptance of a guaranty, or proposal to guarantee, is involved in this case.

Applying these principles to the case under consideration, our first conclusion is that the contract of the appellant, expressed in the form set out in the complaint, was an agreement that his principal, Telford, would perform the covenants contained in the lease and was not the direct engagement of the appellant to do any thing personally except to answer for his principal's default, and it was therefore collateral to that of the principal, and one of strict guaranty; and within the rule laid down, it was the duty of the guarantee to give notice of the default.

It does not follow however that because of a failure to give no-

tice, the guarantor was thereby discharged from liability. A failure to give notice and damage resulting therefrom must both concur in order that the guarantor may be discharged. This is believed to be the result of the doctrine of the best considered cases in this court, as it certainly is of the adjudications of other courts.

In the case of *Davis v. Wells*, 104 U. S. 159, cited approvingly in *Wills v. Ross*, 77 Ind. 1; s. c., 40 Am. Rep. 279, this rule was recognized and followed. *Vinal v. Richardson*, 13 Allen, 521; *Bashford v. Shaw*, 4 Ohio St. 263; *Second Nat'l Bank v. Gaylord*, 34 Iowa, 246; *Brandt Suretyship and Guar.*, § 173.

The fact that notice is required of the guaranty does not make the giving of notice a condition precedent to his right to maintain an action against the guarantor, for the reason that his liability may or may not exist without notice. The notice is not, as in the case of commercial paper, necessary to give the right of action, although the failure to give it may defeat it.

It results from the foregoing considerations that the complaint was not bad for failing to aver notice of the default.

Other grounds of objection are urged by counsel against the complaint, which have received careful attention, but our conclusion is, that while they are not without force, they could only be made available by answer.

Assuming without conceding or denying the necessity of the presence of the appellees to accept the surrender of possession at the end of Telford's term, as urged by appellant, it was only available by answering that fact and coupling it with such other facts as would show injury to him, or that Telford's lease was thereby extended by implication of law, and so if by the subsequent conduct of the appellees in prosecuting suits against Telford, or by accepting payment of damages, the relations of the parties were changed in any way, to the appellant's detriment, all these were matters like the failure to give notice, as we conceive, to be set up in defense.

The judgment is affirmed with costs.

Judgment affirmed.

PENNSYLVANIA MUTUAL LIFE INSURANCE COMPANY V. WILER.

(100 Ind. 92.)

Insurance — evidence of physician — declarations.

In an action on a life insurance policy, the prohibition of testimony by physicians as to attendance on the insured before the application may be waived by the beneficiary, but the waiver as to one does not prevent his asserting the privilege as to others.*

The declarations of the insured, made sometime before the application, and not part of the *res gesta* of acts or facts showing disease, are incompetent against the beneficiary.†

ACTION on a life insurance policy. The opinion states the points. The plaintiff had judgment below.

R. S. Taylor, for appellant.

W. H. Coombs, R. C. Bell, S. G. Morris and J. F. McHugh, for appellee.

BLACK, C. This was an action brought upon a policy of insurance on the life of Solomon Wiler, wherein the appellant promised and agreed to and with said assured, his executors, administrators and assigns, to pay the sum insured to his wife, the appellee, her executors, administrators or assigns within sixty days after due notice and proof of his death.

There was an answer of eight paragraphs, the first being a general denial. Demurrers to the fourth, sixth, seventh and eighth paragraphs were sustained.

The plaintiff replied, and a trial by jury resulted in a verdict for the plaintiff, on which judgment was rendered, a motion for a new trial having been overruled.

[Omitting minor questions.]

On the trial, the defendant introduced certain physicians as witnesses, and offered to prove by them that at various times, before the date of the application for insurance, when they had professionally attended the insured, he was suffering from asthma and other diseases. Upon objections made by the plaintiff, such evidence

* *Grattan v. Metropolitan Life Ins. Co.* (92 N. Y. 274), 44 Am. Rep. 872.

† See *Union Center L. Ins. Co. v. Cheever* (36 Ohio St. 201), 38 Am. Rep. 573.

was excluded. The objections were made and sustained on the ground that the facts which it was thus sought to prove were within the provision of the statute in relation to matter communicated to physicians by their patients. Our statute upon this subject has undergone some changes at various times. The form in which it existed at the time of the trial of this cause is found in section 497, R. S. 1881, as follows: "The following persons shall not be competent witnesses: * * * Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases." It does not devolve upon us in this connection, we scarcely need to say, to adopt or reject or to formulate a rule of evidence. A statute which the legislature had authority to enact is the rule, and it only belongs to us to interpret it in particular cases. As to the wisdom of the rule of the common law protecting confidence between attorney and client, there has been general agreement among judges. Mr. Appleton, in his Rules of Evidence, in advocating its abolishment as a needed reform, found it "difficult to perceive, wherein consists the difference between the confidence which exists between physician and patient," and "that subsisting between the client and attorney, and why different rules should obtain in the last from those adopted in the former cases." Appleton Ev. 163.

While the modern statutory changes in this and other States upon the subject of witnesses have not included the abolishment of the protection of confidences between attorney and client, which in this State are expressly protected by statute, they have extended what was evidently intended to be a like protection to confidences between physician and patient.

Under our statute, when by its terms it provided that physicians were not competent witnesses "as to matters confided to them in the course of their profession, * * * unless with the consent of the party making such confidential communication," it was held by this court, in agreement with authorities elsewhere, that the evidence which might be excluded was not only such as related to what the patient told the medical witness, whether under injunction of secrecy or otherwise, but also such as related to what the physician learned by observation or by examination of the patient, without regard to the character of the supposed ailment. *Masonic Mutual Benefit Ass'n v. Beck*, 77 Ind. 203; s. c., 40 Am. Rep. 295.

The same construction should be given to the statute in its

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present form. It is plain, that without such a construction the statute would be of but little practical efficacy for the purpose intended in its enactment. That the present statute should be so construed is, in effect, held in *Excelsior Mutual Aid Ass'n, etc., v. Riddle*, 91 Ind. 84.

The purpose of the statute is not the suppression of truth needed for reaching correct results in litigation, though this may sometimes incidentally occur (as it may also in other instances of exclusion on the ground of wise policy), but the purpose is the promotion and protection of confidence of a certain kind, the inviolability of which is deemed of more importance than the results sought through compulsory disclosure in a court of justice. Notwithstanding the absolutely prohibitory form of our present statute, we think it confers a privilege which the patient, for whose benefit the provision is made, may claim or waive. It gives no right to the physician to refuse to testify, and creates no absolute incompetency. To hold otherwise would result in many cases in obstructing justice without subserving the purpose of the statute. In this opinion, we are in agreement with the view taken by other courts of enactments upon this subject in form absolutely prohibitory. *Johnson v. Johnson*, 14 Wend. 637; *Grand Rapids, etc., R. Co. v. Martin*, 41 Mich. 667; *Scripps v. Foster*, 41 Mich. 742; *Allen v. Public Adm'r*, 1 Bradf. 221; *People v. Stout*, 3 Park. Cr. 670. And in a case like the one at bar, *Excelsior Mutual Aid Ass'n v. Riddle, supra*, in considering the exclusion of testimony of an attending physician, upon objection based upon the ground that it was privileged, this court approved the rejection of the testimony, and said that so far as the question under consideration was concerned, there was no substantial difference between the statute of 1881 and the former law under which *Masonic Mutual Benefit Ass'n v. Beck, supra*, was decided. As in the case of attorney and client, the inviolability of the confidence, the right of objecting to the disclosure of matter communicated to a physician as such by his patient, does not cease with the death of the latter. This view is reasonable, and it is supported by the decided cases. We do not deem it necessary or proper for us to attempt in this opinion to indicate what should be the effect of this statute in other supposable cases which may come up to this court, and in view of previous decisions here, we have been induced to say thus much upon the subject only because of the earnest argument of the learned counsel for the appellant. See

however *Allen v. Public Adm'r, supra*; *Staunton v. Parker*, 19 Hun, 55; *Pierson v. People*, 79 N. Y. 424; s. c., 35 Am. Rep. 524; *Fraser v. Jennison*, 42 Mich. 206, 224. Not without the careful consideration asked by counsel, we are constrained to interpret the statute as giving to a person, having such a relation to the deceased patient and a contract made by him as that sustained by the appellee, the right in a suit by her on the contract, either to waive the statute or to object on the ground thereof. It may be said that in such case she represents the patient for such purpose. The statute is remedial and should be liberally construed with a constant view to its purpose. Confining our decisions to the case before us, we are satisfied that a proper application of the statute was made in *Masonic Mutual Benefit Ass'n v. Beck, supra*, and *Excelsior Mutual Aid Ass'n v. Riddle, supra*. Besides the citations in the former case, see *Gartside v. Connecticut Mutual Life Ins. Co.*, 76 Mo. 416; s. c., 43 Am. Rep. 765.

The plaintiff, by way of rebuttal, introduced as a witness the physician, who on behalf of the defendant as medical examiner, had examined the insured for this insurance, and elicited testimony from him tending to prove that the insured was in good health at the time of the application. Afterward the defendant recalled the physicians before introduced by the defendant, and again sought from them the evidence which had been excluded as above stated. Upon objection, their testimony was again excluded. This offer was made upon the theory that the plaintiff, by having herself introduced the testimony of one physician, had waived her right to object to the testimony of other physicians. This theory is not well founded. If the plaintiff's examination of said medical examiner as a witness could be regarded as a waiver of a privilege, the consent of the patient, or of one entitled to stand as his representative, to the production in evidence of facts learned in a professional capacity by one physician, could not be construed as consent to the divulging of other confidential communications to other physicians.

The court, upon the plaintiff's objection, excluded offered testimony of one Carney and of one Crow, witnesses for the defendant, the offered evidence having relation to declarations of the insured. The testimony of Carney was contained in his deposition. He deposed that at some time, not definitely stated, but which was more than two years and a half before the application, the insured used

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the words, "This damned asthma." This witness testified that he did not know of whom the insured was speaking.

The witness Crow had testified that he was in the employment of the insured from about the 1st of February, 1877, until the 15th of December, 1878. The defendant offered to prove by him, "that Mr. Wiler, on different occasions, during the time named during which the witness was in his employ, and before this application was made to the company for a policy of insurance, stated to the witness that he had the asthma, and suffered from it."

It was not shown, and it was not proposed to show, in either instance, on what occasion or under what circumstances the words were used, and no accompanying fact was shown or offered in evidence.

The policy, during the life of the insured, after its execution, as well as after his death, was a chose in action owned by the plaintiff as her separate property. Without her joining, her husband could not assign it. *Pence v. Mayspeace*, 65 Ind. 345; *Gouffrey v. Wilson*, 70 Ind. 50.

The declarations of the insured, uttered at such long intervals before the making of the application, and not shown to have been parts of the *res gestæ* of any acts or facts indicating a diseased condition of the insured which the declarations tended to explain, could not prove, or tend to prove, the fact of his ill health, but constituted mere hearsay, and as such were not admissible against the plaintiff to show a breach of warranty. *Swift v. Mass. Mutual Life Ins. Co.*, 63 N. Y. 186; s. c., 20 Am. Rep. 522; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; s. c., 25 Am. Rep. 482; *Fraternal Mutual Life Ins. Co. v. Applegate*, 7 Ohio St. 292; *Hurd v. Masonic Mutual Benefit Society*, 6 Ins. L. J. 792; *Mobile Life Ins. Co. v. Morris*, 3 Lea, 101; s. c., 31 Am. Rep. 631; *May Ins.*, § 214; *Bliss L. Ins.*, § 371, *et seq.*

PER CURIAM. It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellant.

Judgment affirmed.

CLARK V. VAN COURT.

(100 Ind. 118.)

Guardian and ward — ratification.

Where a ward, after majority, without fraud or undue influence, executes to his late guardian a receipt for the value of property obtained by him from the guardian during minority under a voidable contract, this is a ratification, although he was ignorant that he might disaffirm.

SETTLEMENT of guardian's account. The opinion states the case.

E. A. Greenlee and — *Parsons*, for appellant.

J. A. Stein and *G. W. Collins*, for appellee.

COLERICK, C. The appellant, as the guardian of the appellee, presented to the Tippecanoe Circuit Court, at its November term, 1882, his final settlement report, which was by the court referred for examination, as to its correctness, to a master commissioner, who was ordered "to report the facts and his conclusions of law thereon" to the court. Afterward the appellee filed exceptions to the guardian's report, and they were also referred to said master commissioner under a like order. At the February term, 1883, of said court, the master commissioner made his report, in which was embraced a statement of the facts found by him and his conclusions of law thereon. Exceptions were filed by the appellant to the second and fifth specifications of the facts so found by the master commissioner, and to his conclusions of law upon the facts set forth in said fifth specification, which exceptions were overruled by the court, and the following final order was then made and entered: "And the court after due consideration of said report (referring to the report of the master commissioner) and the exceptions thereto, after argument of counsel, overrules said exceptions, and does in all things approve, ratify and confirm said report, to all of which said guardian excepts; and it is ordered by the court that said guardian do amend his said final settlement report so that the same may conform to the findings, suggestions and conclusions of law of said master commissioner, and so as to show a final balance

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of \$162.24 in favor of said William Van Court, to all of which said guardian excepts."

[Minor matter omitted.]

The only question properly before us for consideration is : Did the master commissioner err in his conclusions of law, which were adopted by the court, upon the facts found and set forth in the fifth specification of the special finding of facts? Which facts, so found, were as follows :

"Said master finds that voucher No. 5, which purports to have been given for necessities furnished said ward by his guardian, was in fact given for the price of a certain mare sold to said ward by his said guardian during the minority of said ward ; that the said ward had no necessary need of a horse ; that the said mare was, at the time she was so sold to said ward, of the probable value of \$100 ; that so soon as the guardian knew his said ward had been awarded a pension, which was in the fall of 1881, he procured said ward to execute a receipt in the sum of \$100, purporting to be for 'necessaries,' but in reality being for the price of said mare ; that said ward sold said mare to one Charles Stoddard, November 25, 1881, for \$50 in cash, one old watch (the proof showing it to be worth from \$10 to \$50), and a trunk, probably worth \$6 ; that said Stoddard afterward sold said mare for \$116 ; that four days after said ward came of full age said guardian took his said ward to the office of said attorney, where a new receipt was executed by said ward, the one now excepted to, and the first one was destroyed ; that said guardian knew that said ward could disaffirm the said sale, but the said ward did not, at the time he signed said last receipt, know he could disaffirm said sale ; that said ward has not tendered to said guardian either the said \$50, or the said watch, or the said trunk, but still holds in his possession the said watch and the said trunk, and he has claimed his right to disaffirm said sale at the time of filing his said exceptions, but he says to your master that he is now willing to allow his guardian a credit equal to the amount of cash he received, to-wit, \$50."

The conclusions of law reached and declared by the master commissioner upon the facts above set forth were : "That said ward can disaffirm, and has elected so to do, the sale of said mare, without the tendering to said guardian of the cash received, or the watch and trunk received, from said Stoddard, which watch and trunk are now in the possession of said ward, and that the execu-

tion of the receipt after the said ward became of age, not knowing at the time that he could disaffirm said sale, was not a ratification thereof."

The law, as settled in this State, fully sustains the conclusion that was reached by the master commissioner, as to the privilege or right which the appellee possessed to disaffirm the contract which he made while an infant, without restoring, or offering to restore, the property which he purchased and received from the appellant under the contract.

A contract made by an infant, although executed, is, as to him voidable, *Fetrow v. Wiseman*, 40 Ind. 148, and it may be avoided by him at any time during his minority, or on his arrival at full age, *Indianapolis Chair M'fg Co. v. Wilcox*, 59 Ind. 429, without returning, or offering to return, to the other party, the property which was obtained from him under the contract. *Carpenter v. Carpenter*, 45 Ind. 142; *Towell v. Pence*, 47 Ind. 304; *White v. Branch*, 51 Ind. 210; *Dill v. Bowen*, 54 Ind. 204. But we are clearly of the opinion that the master commissioner erred in his conclusion of law, upon the facts found, that the execution of the new receipt by the appellee, after he became of age, was not, for the reason stated, a legal ratification by him of the contract which he made when an infant. There was no fact found showing, or tending to show, that any fraud, undue influence, or unfair means of any kind was resorted to or practiced by the appellant, or any other person, to persuade the appellee to ratify the contract; nor was there any fact found showing, or tending to show, that the ignorance of the appellee as to his legal right to disaffirm the contract, or withhold his ratification thereof, was induced by the appellant, or any other person. And yet in the absence of such facts, and in the presence of the facts that were found, showing that the contract so satisfied was founded upon an adequate consideration, and was one that ordinary honesty required the ratification of, the master commissioner held that the appellee was not bound by his act ratifying the same, merely because he did not know that he had the legal right to disaffirm it.

It is true that a conflict exists in the authorities upon this question, and that some of the earlier cases probably sustain the master commissioner in his conclusion, but it is not supported by the more recent and better considered ones. The law on this subject is, in our opinion, correctly stated in *Wharton on Contracts*, section 57,

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where it is said : " Supposing that there be no fraud on the part of the other contracting party, it is not necessary to the validity of an affirmance, that the person making it should be aware of its legal effects. He may have as little knowledge of these effects the day after as he had the day before he comes of age. But the line drawn by the law is necessarily arbitrary ; and as soon as he becomes of age, a knowledge of the legal character of his act is imputed to him. It is true that there have been intimations that a ratification will not be recognized by the courts unless made with a knowledge of the consequences. If by this is meant that loose talk by a person just coming of age, or concessions induced by misstatements or suppressions of the other side, will not be regarded as ratification, the conclusion may be accepted as true. But to say that a knowledge of the legal consequences of a ratification is necessary to validate a ratification, not only interposes a condition it would be difficult to establish, and which would often be made dependent upon the testimony of the party himself long afterward when his views may have changed, but would invalidate all ratifications, since there is no ratification all of whose legal consequences can be foreseen. Hence the better opinion is that a ratification, made by a person of sound mind, on arriving at his majority, will be held valid, if untainted with fraud or undue influence, though the party making it was not at the time aware that it bound him in law. If however the ignorance of the party ratifying be in any way induced by the other side, then the ratification will not be regarded as operative." See to same effect *Metc. Con.* 59 ; *Taft v. Sergeant*, 18 Barb. 320 ; *Ring v. Jamison*, 6d Mo. 424 ; *Morse v. Wheeler*, 4 Allen, 570 ; *Stevens v. Lynch*, 12 East, 38 ; *Anderson v. Soward*, 40 Ohio St. 325. In *Morse v. Wheeler*, *supra*, the cases sustaining the view expressed by the master commissioner in this case were ably reviewed, and shown to rest alone for their support on the mere *obiter dictum* of Lord ALVANLEY in the case of *Harmer v. Killing*, 5 Esp. 102.

In all the cases where the doctrine contended for by the appellee has found sanction, the contracts in controversy were executory and not executed ones, and in all the text-books where the doctrine has been referred to, it has been with reference to executory contracts only. Although no sufficient reason occurs to us why the doctrine, if correct, should not be applied to executed as well as to executory contracts, yet we have been unable to find a single case

in the reports where it has ever been so applied. The only case which we have been able to discover in the reports of this court, in which such doctrine has been even referred to, is that of *Fitrow v. Wiseman*, 40 Ind. 148. A careful examination of that case will show that the question presented in this case was not involved therein, and hence could not have been, and was not then decided by this court. All that was said in that case upon the question, now properly before us, by BUSKIRK, J., who prepared the opinion, was *obiter dictum*, and so far as it seemingly conflicts with the views now expressed by us, is disapproved. We have examined the cases of *Conaway v. Shelton*, 3 Ind. 334, and *Conklin v. Ogborn*, 7 Ind. 553, which are cited by BUSKIRK, J., in *Fetrow v. Wiseman*, *supra*, and find that the question involved in this case was not even adverted to in those cases, much less discussed or decided.

It follows, from what we have said, that in our opinion the master commissioner erred in his conclusion of law that the contract of the appellee was not, for the reason stated, legally ratified by him, and for the error of the court in overruling the appellant's exception thereto the judgment of the court below ought to be reversed.

It appears in the record that upon the suggestion of the master commissioner, based upon his special finding of the facts and conclusions of law, the court ordered the appellant to amend his final settlement report by striking therefrom the credit of \$100 claimed by him and evidenced by the receipt that had been executed to him by the appellee at the time of the ratification of the contract herein referred to, and in the language of the master commissioner, "take a credit in place thereof of \$50, as herein shown to be authorized by the ward." We think, for the reason stated by us, that the appellant was entitled to the credit of \$100, claimed by him.

PER CURIAM. The judgment or order of the court below is reversed, at the costs in this court of the appellee, and the cause is remanded with instructions to the court to allow the appellant an additional credit of \$50 on the balance in his hands, as such guardian, as found and determined by the court below.

Judgment reversed.

McLean v. Equitable Life Assurance Society of the United States.

MCLEAN V. EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S.

(100 Ind. 127.)

Insurance — settlement by company's fraud.

Where a life insurance company, by its agent, fraudulently represents to the executor of the insured, whose mental faculties are impaired, that it has discovered evidence sufficient to avoid the policy, and will contest and defeat it, and thus procures a settlement for a sum grossly inadequate, the settlement may be set aside and the balance due recovered.*

ACTION on a life insurance policy. The opinion states the case. The defendant had judgment below.

W. E. McLean, C. F. McNutt, J. G. McNutt, N. G. Buff and J. T. Pierce, for appellant.

J. M. Allen, W. Mack, H. C. Nevitt, S. C. Davis and S. B. Davis, for appellee.

COLERICK, C. This action was originally brought by Lucius Ryce, as executor of the last will of his son William S. Ryce, deceased, to recover an alleged balance due upon an insurance policy issued by the appellee upon the life of said William S. Ryce, for the sum of \$10,000, payable on the 25th day of July, 1888, to the assured, if he should then be living, and in the event of his death before that time, then to his executors, administrators or assigns, in sixty days after due notice and proof of his death. During the pendency of the action said executor died, and the appellant, as the administrator *de bonis non* of the estate of the assured, was substituted as the plaintiff therein.

The complaint consisted of three paragraphs, to which separate demurrers were overruled. A motion was made to strike out parts of the complaint, which was also overruled, and thereupon the appellee answered the complaint, to which answer a reply was filed. The issues so formed were submitted to a jury for trial, and after the appellant had introduced his evidence in support of the complaint, the appellee demurred to the evidence, and the demurrer was sustained by the court, to which ruling the appellant duly ex-

* See *Hedden v. Griffin* (126 Mass. 229), 49 Am. Rep. 25.

cepted, and thereupon final judgment was rendered in favor of the appellee from which the appellant appeals, and assigns as error for its reversal, the ruling of the court in sustaining said demurrer.

The appellee has filed an assignment of cross errors, in which it assigns as errors the rulings of the court upon the demurrers to the several paragraphs of the complaint, and on the motion to strike out parts of the complaint. It is unnecessary to refer more specifically to the pleadings in the action, except the complaint.

The first and second paragraphs in their material averments were in substance alike. They both averred the issuing by the appellee of the policy of insurance above referred to, and its acceptance by the assured, who until his death observed and performed all of the conditions of the policy on his part, and the appointment and qualification of the plaintiff as such executor, and the furnishing by him of the proof required by the policy, of the death of the assured, and alleged that the appellee by certain false and fraudulent representations made by its authorized agent, which were fully recited therein, induced the plaintiff to settle the claim existing in favor of the estate of the assured upon said policy, by accepting and receiving in full payment thereof \$7,000 less than the amount actually and legally due thereon, and prayed judgment against the appellee for the difference between the sum so paid and the amount that was due on the policy.

The third paragraph was founded on the policy of insurance, but unlike the other paragraphs, failed to aver any excuse for not making the policy or a copy thereof, a part of the pleading.

The vital question presented for our consideration is, did the court err in sustaining the demurrer to the evidence?

[Minor considerations omitted.]

It appears by the evidence that the assured was, for many years before and at the time of his death, a dry goods merchant in the city of Terre Haute, Indiana. He died at Grand Haven, Mich., on the 18th day of August, 1877, of chronic inflammation of the stomach, with which he had been afflicted for two or three years immediately preceding his death. The policy of insurance referred to in the complaint was issued to him by the appellee on the 2nd day of August, 1865, upon which he paid to the appellee each year thereafter until his death, covering a period of twelve years, the annual premiums thereon, as they became due and payable, amounting in all to \$4,680.80. No evidence was introduced even tending

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to prove that any misrepresentations were made by him in his application, or otherwise, to secure the issuing of the policy, or that he in any manner after its issue violated any of its conditions. He was about forty-three years old at the time of his death. By the provisions of his will he appointed his father, Lucius Ryce, now deceased, the executor thereof, and he, after first qualifying as such executor, furnished appellee with the proof required by the policy, as to the time, place and cause of the death of the assured. About the 19th day of October, 1877, the appellee sent an agent to Terre Haute, Indiana, where the executor resided, to adjust the claim, and for that purpose, the agent called several times upon the executor, and had interviews with him in relation to its adjustment. The only evidence as to what transpired between them at these interviews was rendered by the executor, who stated that the agent informed him that the policy was not "worth a cent;" that he had been to Grand Haven, Mich., where the assured died, and discovered "something" that "was fatal to the policy," and had secured sufficient evidence "to defeat the policy," and that the company would not pay the claim, but would contest the same. After the agent had impressed the executor with the belief that the company would not pay the claim, and that the company could and would defeat its collection, he stated to the executor that he thought it would be right for the company to pay the sum that the assured had paid to the company, with interest thereon; and after computing the amount thereof, he offered to pay the same in full payment of the claim, which offer the executor accepted, and surrendered the policy. He also testified that at the time these interviews occurred and the settlement was made, he was "in great distress of mind," and "was hardly fit to do business," and "did not know what he ought to do," and that debts were troubling him which he wanted to pay but could not, and that he "had sacrificed everything he had of his own to pay the debts," and that he had been induced to accept the offer of settlement by reason of the representations that were made by the agent.

The facts to which the executor testified, above set forth, were not disputed, nor was his evidence in conflict with, or impaired by any other evidence rendered in the cause, but on the contrary, was strongly supported and corroborated in many of its essential features by other evidence. A number of prominent business men of the city of Terre Haute, Indiana, who were personally and intimately acquainted with him, and had been for many years, testified that

from the time of the death of his son, and for months afterward embracing the time when the settlement occurred, he appeared to be in great mental distress, caused by the death of his son, and his own financial embarrassments as the surety of his son. His liabilities as such surety amounted to about \$80,000, and to pay them he sacrificed all of his property. He was about seventy-three years old at the time of the settlement, and was then very feeble in body and mind. It was admitted on the trial that at the time of the settlement the policy and its accumulations, by way of dividends, amounted in all to \$12,078. The amount that was paid by the appellee under said settlement was \$7,136.08, which was \$4,941.92 less than the amount that was due on the policy. The representations so made by the agent of the appellee were false, and we think fraudulently made by him to induce the settlement.

The question presented to us by these facts is whether the law will permit the appellee, under a settlement procured by such means, to withhold the payment of the balance that was confessedly due to the plaintiff, as such executor, on the policy, and thereby enable the appellee to secure and enjoy the fruits of the fraud that was committed by its agent in inducing, by false and fraudulent representations, an aged man whose mental faculties were impaired and shattered by age and financial disasters, and whose heart was sorely afflicted by domestic calamities, rendering him helpless to resist the influence of the cunning arts that were practiced upon him by the wily and unscrupulous agent, to enter into a contract, that was, in its terms, grossly unjust to the estate which he represented. We think not. The law is strong, and protects the weak and helpless against such machinations, and being just, defeats their consummation. See *McCormick v. Malin*, 5 Blackf. 509; *Marshall v. Billingsly*, 7 Ind. 250; *Wray v. Wray*, 32 Ind. 126. The evidence sustained the averments in the first and second paragraphs of the complaint, and the court should have rendered judgment thereon in favor of the appellant.

PER CURIAM. The judgment of the court below is reversed, at the costs of the appellee, and the cause is remanded, with instructions to the court to overrule the demurrer to the evidence, and render judgment in favor of the appellant on the first and second paragraphs of the complaint for \$4,941.92, with six per cent interest thereon from the 19th day of October, 1877, with costs.

Petition for a rehearing overruled.

Negligence — dangerous premises — license.

Where one merely suffers others to cross his land, without express or implied permission, he is not bound to keep the premises free from pitfalls or obstructions.*

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellant.

W. P. Edson, for appellee.

MITCHELL, J. The complaint in this case charges that the Evansville and Terre Haute Railroad Company was "possessed" of a certain piece of ground lying in the western part of the city of Mount Vernon, which was uninclosed and which was traversed by a foot-path leading from the public street to a house situate on another piece of uninclosed ground adjoining it, and which was also in the possession of the railroad company. The complaint then avers, "that there was no public street, alley or way leading from the streets and alleys of said city to said house, and that the said path was the usual way of passing to and from said house; that the defendants, being so as aforesaid possessed of said piece of ground, wrongfully permitted a deep well which was thereon and near said path to be and remain open, uninclosed, unguarded and unsafe to persons lawfully passing along said path, whereby on the 9th day of December, 1882, shortly after it became dark, the plaintiff, who was a shoemaker at work at his trade in said city, while lawfully passing along said path from his work to said house, where he was boarding with the occupants thereof, who were tenants of the defendants, and without any negligence on his part, accidentally passed a short distance away from said path in the night time, as aforesaid, and fell into said well and was seriously injured and permanently disabled from working at his trade, whereby." etc.

* See *Gillespie v. McGowan* (100 Penn. St. 144), 45 Am. Rep. 365.

One of the errors assigned here is, that the court erred in overruling the demurrer to the complaint. Whether this complaint is good or not must depend upon a consideration of two questions:

1. Taking the facts as stated, did the railroad company in permitting its premises to be crossed in the manner stated, and in leaving the well into which the plaintiff fell uncovered, violate any legal duty or obligation which it owed him, of which he has the right to complain, and,

2. Was the appellee in the exercise of due care when he "accidentally passed a short distance away from said path in the night time" and fell into the well?

Before it can be affirmed that the appellant was negligent, with respect to the transaction concerning which its omission is imputed to it as wrongful, it must appear that it was under some legal duty or obligation to the plaintiff, at the time when and place where the injury occurred, which was left undischarged. If it is liable at all, this is the foundation upon which its liability rests.

The owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such case the licensee goes there at his own risk, and as has often before been said, enjoys the license with its concomitant perils.

If however the owner or occupant of lands by any enticement, allurements or inducement, causes others to come upon or over his lands, then he assumes the obligation toward persons so coming, to provide a reasonably safe and suitable way for that purpose. An owner may not by invitation, either express or implied, induce another to come upon or pass over his premises, without keeping them in such condition of safety as to admit of his passing over by the means designated or prepared without injury, provided he uses due care. To make the owner or occupant liable for an injury received by one passing over his premises, something more than a mere passive acquiescence in the use of his land by others is necessary. So long as his lands are used by others, be it never so frequent, for their own convenience, he is not liable. But if by some act or designation of his persons are led to believe that a way or path over premises was intended to be used by travellers or others having lawful occasion to go that way, then as to such persons the owner or occupant comes under an obligation to keep it free from danger-

ous obstructions or pitfalls which might cause them hurt. The inducement must be equivalent to an invitation, either express or implied; mere permission is not sufficient. *Carleton v. Franconia Iron and Steel Co.*, 99 Mass. 216.

It does not appear from the complaint in this case who was the owner of the *locus in quo*, the averment being that "the defendants were possessed of a certain piece of ground," and that "the defendants, being so possessed of said piece of ground, wrongfully permitted," etc. Nor is there any thing to show how long the appellant had been in possession before the injury occurred; and while it is averred that "said path was the usual way of passing to and from said house," it is not averred that there was not another safe and convenient way which was designed by the owner as the way of approach to his house. From all that appears in the complaint, the tenant who occupied the house, and the boarders, may have habitually chosen this path for their own convenience, without any invitation or inducement from the owner, and because they and other persons usually chose that way, rather than some other which may have been, for all that appears in the complaint, designed by the owner, they can place it under no obligation to look out for their safety.

The complaint fails to show either the knowledge or permission of the appellant so to use its lands; while as we have seen, something more than knowledge and acquiescence of the owner is necessary in order to put him under the obligation to keep the path safe.

For all that is disclosed, the tenant and his boarders, including the plaintiff, may have made the very path which he was pursuing when the injury befel him, and granting, though it is nowhere averred, that the railroad company knew of and sanctioned the use of its premises in this manner, this falls far short of making it liable. If it were alleged or if it could be inferred from the complaint that this path was in any way designed, prepared or intended by the owner as a means of approach to the house, or if it appeared by averment or inference that no other convenient way of approach, either public or private, had been prepared or designated by the owner as a means of access to the house, the case would be entirely different; and it would be different too, if it were a case like *Graves v. Thomas*, 95 Ind. 361; s. c., 48 Am. Rep. 727, where a path had been used as a part of the public sidewalk for such a length of time as to give the public rights in it as such. *Lary v. Cleveland, etc.*

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R. Co., 78 Ind. 323; s. c., 41 Am. Rep. 572; *Sweeney v. Old Colony, etc.*, *R. Co.*, 10 Allen 368; *Knight v. Abert*, 6 Penn. St. 472; 1 Thomp. Neg. p. 303, § 3, and authorities cited; *Jeffersonville, etc.*, *R. Co. v. Goldsmith*, 47 Ind. 43; *Hargreaves v. Deacon*, 25 Mich.

1. We think however that the averments in the plaintiff's complaint do not repel the presumption of contributory negligence, or rather that upon the facts stated in the complaint a presumption of negligence on the part of the plaintiff arises.

[Omitting this.]

The judgment is reversed with costs, with directions to the court below to sustain the demurrer to the complaint.

Judgment reversed.

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(100 Ind. 227.)

Damages — remote — profits.

On a claim of damage for failure properly to adjust a rake to a reaping machine, according to contract, damages for loss of part of the crop thereby are not recoverable.

ACTION for price of rake, etc. The opinion states the case. The plaintiff had judgment below.

H. D. Wilson and *W. J. Davis*, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellees.

COLERICK, C. The appellees sued the appellant for the price of a table-rake and attachments for a reaper. The complaint consisted of three paragraphs. The first averred that they had on the 1st day of July, 1881, sold and delivered the rake and attachments to the appellant for \$100, one-half of which sum he promised to pay on the 1st day of October, 1881, and for the other half execute his note payable on the 1st day of October, 1882, with interest; that he had refused to comply with his said promise, and that by reason thereof said sums are due and remain unpaid, etc. The second averred the sale and delivery of said property for \$100 upon the appellant's promise to pay one-third of the price in cash on the

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1st day of October, 1881, and to execute his notes for the residue, one for one-half thereof, payable on the 1st day of October, 1882, and the other for the balance, payable on the 1st day of October, 1883, both with interest and attorney fees. The third was the common count for property sold and delivered.

The appellant filed an answer of three paragraphs. The first was a general denial. The second averred that the appellees were not, but that Aultman, Miller & Co. were the real parties in interest. The third, as a partial answer to the cause of action stated in the third paragraph of the complaint, averred, in substance, that on the 1st day of July, 1881, Aultman, Miller & Co., who manufactured the rake and attachments mentioned in said paragraph, through the appellees, as their agents, sold the same to the appellant, and agreed to adjust the same to a reaper he then owned, so as to enable him to properly cut and save forty acres of wheat which the appellees knew were then growing upon his farm, in consideration of which he promised to pay them \$65 two years from that time; that said Aultman, Miller & Co., though often requested, did not adjust said rake and attachments to said reaper, nor could they do so, nor could the appellant do so himself, or procure any one else to properly adjust the same, so as to properly cut and save his wheat, in consequence of which he was damaged \$50. Wherefore, etc.

The appellant also filed a counter-claim, in which he averred, in addition to the facts alleged in the third paragraph of his answer, that when the appellees failed to adjust said rake and attachments the appellant's wheat was ripe, and as appellant could get no other machine, and had no other means with which to cut said wheat, he was compelled to use his reaper with said rake and attachments improperly adjusted, or suffer a greater loss; that in its use a part of the wheat was not cut, but broken down, and a portion that was cut was lost and could not be saved; that in consequence of the use of said machine, so improperly adjusted, the appellant lost eighty bushels of wheat of the value of \$80. Wherefore, etc.

A demurrer was sustained to this pleading, and a reply was filed to the second and third paragraphs of the answer. A trial was had and a verdict in favor of the appellees for \$40, with answers to interrogatories, was returned. A motion for a new trial and a motion to tax the costs of the motion to the appellees were overruled and judgment was rendered upon the general verdict. These last rulings are assigned as error.

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The demurrer to the counter-claim was, we think, properly sustained. The loss of the appellants' wheat caused by the voluntary use of a machine improperly adjusted must be borne by himself, as the consequences did not necessarily arise from a breach of the agreement to properly adjust the rake and its attachments. The damages to be recovered must be the natural and proximate consequences of the breach of the agreement. 2 Greenl. Ev., § 256; 1 Sedgw. Dam. 66; *Loker v. Damon*, 17 Pick. 284; *Cline v. Myers*, 64 Ind. 304; *Prosser v. Jones*, 41 Iowa, 674. In the case last cited the defendant agreed to give the plaintiff \$100 for a threshing machine and thresh his wheat at any time within four days after notice. This he failed to do, and the plaintiff, whose wheat was unstacked, and who was unable to get another machine to thresh it, brought an action to recover for such injury as it afterward sustained, and the expense of stacking it, but it was held that such damages were too remote to be recovered in an action for the breach of a contract. This case seems precisely in point, and announces, as we think, the law correctly upon this question. The damages sought to be recovered are not the direct and immediate consequences of the breach of the agreement, and therefore there was no error in sustaining the demurrer.

[Minor questions omitted.]

This disposes of all the questions in the record, and as we are of opinion that no error was committed, the judgment should be affirmed.

PER CURIAM. The judgment of the court below is affirmed, at the costs of the appellant.

Petition for rehearing overruled.

Judgment affirmed.

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(180 Ind 374.)

Adoption — descent.

Where a child, adopted by a husband and wife jointly, dies without child or descendant, owning lands inherited from the adopted mother, the surviving adopted father inherits them to the exclusion of the natural mother.

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CLAIM of lands. The opinion states the case.

G. W. Paul and *J. E. Humphries*, for appellant.

E. C. Snyder, *P. S. Kennedy* and *S. C. Kennedy*, for appellee.

ELLIOTT, J. Isaac Davis and his wife, Jessie Davis, adopted, as their child, Emily Davis, the natural daughter of Elizabeth Davis, now Elizabeth Krug. About a year after the adoption of the child, Mrs. Jessie Davis died, leaving as her only heirs her husband and her adopted daughter, and within a year the adopted daughter also died. The natural mother claimed two-thirds of the land which her child inherited from Mrs. Jessie Davis, and conveyed part of it to the appellant. This claim the surviving husband resists, and the question is: Who shall have the land, the surviving husband or the natural mother? We deem it one of the important factors in this legal problem, that the land vested in the child solely by virtue of its legal relationship to Mrs. Davis and not by virtue of its natural relationship to any one. The title vested in the adopted child by force of law, and not because of any inheritable right springing from a natural kinship.

In the case of *Davis v. Krug*, 95 Ind. 1, this element was considered one of importance, and it was held that property derived by the child from one of the persons by whom it had been adopted went to its other parent by adoption, rather than to its natural mother. We limit our decision in this instance, as it was limited in the former case, to the property derived from one of the adopting parents by inheritance, and confine it to the question of the rights of the natural mother as against the surviving parent of the deceased child, who became such by law, and not by nature; but in thus limiting our decision, we do not mean to intimate that if the property came to the adopted child otherwise than by inheritance from kinsmen of its own blood, the adoptive parents would not inherit to the exclusion of the natural mother. The case to which we have referred is decisive of this controversy, but as it has been vigorously assailed, we have, at the earnest solicitation of counsel, again examined the question.

The equity of the case is with the surviving husband and against the natural mother who gave up their child, sundering all maternal ties, and suffering a stranger to take a mother's place. The hus-

band, who enabled his wife to acquire or preserve her property, has infinitely stronger claims than the natural mother, who cast aside her child. Rules of law are intended to secure justice, and justice requires that the husband who has maintained the wife should be preferred to the mother of a child which was the child of his wife only by adoption. Equity is natural justice, and natural affection and natural right make a strong equity in the husband's favor. Suppose that the claim were urged by a surviving wife, instead of the husband, in such a case as this, would it then be doubted that the wife, whose joint labor and care had aided in accumulating the property, should be preferred to the natural mother who was a stranger, both in blood and in law, to the person who was the source of title? Must the wife be put off with a paltry share to make room for a stranger who has no claim upon the bounty of the husband, nor of right, any place in the husband's affections? The principle which rules in the one case must govern in the other. We have shown the equity of the case for the reason that equity has a potent influence in the construction of statutes. Courts always endeavor to so construe a statute as to make it an instrument of justice. As HOBART, C. J., long ago said, "equity must necessarily take place in the exposition of statutes." Courts can neither wrest words from their plain meaning, nor violate the spirit of a statute upon their own notions of natural justice; but where the statute is general in its terms, and not clear and definite in its letter and scope, courts may give it such a construction as will make its operation just and beneficial. To aver the contrary would be to assume that the legislature did not intend to make a just law. There is nothing in the statute before us requiring us to declare that the rights of a surviving husband shall yield to the rights of the natural mother of a child which he had joined with his wife in adopting. When the statute is read by the light of the civil law from which its principles are borrowed, and is considered in connection with the general principles of the law of descent and the statutes upon that subject, it becomes clear that its construction must be that which natural justice requires.

The common law made no provision for the adoption of children, and we can get no light from that source. *Krug v. Davis*, 87 Ind. 590; *Ross v. Ross*, 129 Mass. 243; s. c., 37 Am. Rep. 321. The Roman law made provision for adopting children, and the provisions of that law, as revised and changed by Justinian, formed a complete

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system. Sandars' Justinian, 103, 105, 109. The adopted child was, as that law declared, "assimilated, in many points, to a son born in lawful matrimony." That law preserved to the child all the family rights resulting from his birth, and secured to him all the family rights produced by the adoption. Sandars' Justinian, 105. The Supreme Court of Louisiana, in discussing this subject, says: "And the effect was such, that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person." At another place the court said: "Now when in an enabling or permissive statute the legislature has used a word so familiar in its ordinary acceptation, and so well known in the sources of our law, does it become the judiciary to say that it has not such meaning, because the law-giver has not himself expressly defined the sense in which he intended the word should be taken?" It is also said: "The law-giver ought not to be supposed ignorant of this state of things, or to use a term in more restricted sense than it was formerly known to our laws." *Vidal v. Commagere*, 13 La. Ann. 516. It is true that the remarks of the court apply with rather more force to a State which has adopted the civil law than to one where the common law prevails, but they nevertheless declare a general principle which has a place in all enlightened systems of jurisprudence, for it is established law that where a rule is borrowed from another body of laws, courts will look to the source from which it emanated to ascertain its effect and force. *City of Vulparaiso v. Gardner*, 97 Ind. 1. If as the civil law so fully provided, a child of the adoptive son stood in the relation of grandchild to the adoptive father, then the son himself must stand as the child of that father. The statute of Massachusetts makes some exceptions as to the child's status, and it was held that the adoptive child as to property of the adoptive father stood as a natural child, save in so far as the exceptions declared otherwise, the court saying: "The adopted child, in this case therefore, in construing her father's settlement, must be regarded in the light of a child born in lawful wedlock, unless the property disposed of by the settlement falls within one of the exceptions." *Sewall v. Roberts*, 115 Mass. 262.

In *Ross v. Ross*, *supra*, it was said, in reviewing the cases of *Schafer v. Eneu*, 54 Penn. St. 304, and *Commonwealth v. Nancrede*, 32 Penn. St. 389: "But the opinion in each of those cases clearly recognizes, what indeed is expressly enacted in the statute, that as

between the adopted child and the adopting father, the child has all the rights and duties of a child, and the capacity to inherit as such." Elsewhere in the opinion from which we have quoted, it is said : "It is the rights, duties and capacities, arising from the event which creates a particular status, that constitute the status itself and afford the best definition of it." It is true that the law cannot do the work of nature and create one a child who by nature is a stranger, but it may fix the legal status of the child. While therefore the Pennsylvania court is right in saying that the law cannot make the child a natural one, the conclusion that the status of the adoptive child to the adoptive father may not be fixed by law does not follow by any means. The law may declare the status, and from the status courts must determine the correlative rights of parent and child thus created. One of the acutest of legal minds and clearest of writers says : "There are certain rights and duties, with certain capacities and incapacities to take rights and incur duties, by which persons, as subjects of law, are variously determined to certain classes. The rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a condition or status which the person occupies, or with which the person is invested." 1 Austin Juris. 41.

In *Burrage v. Briggs*, 120 Mass. 103, this doctrine was carried very far, for it was there held that the status of the adoptive child was such that it would take as a child under a residuary clause of the adoptive father's will, where the specific legacy had lapsed. It was decided in *Luney v. Vantyne*, 40 Vt. 503, that as to the right to recover for services there was no difference between an adoptive and a natural child.

In the case of *Barnes v. Allen*, 25 Ind. 222, it was held that the adoptive child was the heir of the adoptive father in the degree of a child, and was entitled to inherit from him all the estate of which he could deprive his wife. This is impliedly an assertion that as to the adoptive parent the status of the adoptive child is, for the purpose of inheriting from the father, that of a natural child. The court, in *Isenhour v. Isenhour*, 52 Ind. 328, said : "The law can endow an adopted child with all the rights in property of a natural child, but it has not the power to make him the natural child of any woman but his natural mother." It was also said, in speaking of the adoption by the husband, instead of by both the husband and wife, that "if he had been adopted by both, perhaps he might

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have been held as a child 'by a previous wife,' within the proviso in section 24 of the act regulating descents." The cases of *Krug v. Davis, supra*, and *Davis v. Krug, supra*, very explicitly affirm that as to the adoptive parents and their property, the status of the person adopted is that of a natural child.

In a recent text-book it is said : "And the rights of the parent by adoption are treated substantially as those of a natural parent." Schoul. Dom. Rel., § 232. This author thus interprets our case of *Barnhizer v. Ferrell*, 47 Ind. 335 : "An adopted child usually inherits from the adopting parent, and *vice versa* ; but otherwise as to collateral kindred." Schoul. Dom. Rel., § 232, n.

In the case referred to, the court correctly laid down the law as to the status of the child, but misled by confusing a natural relation with a legal status, was carried to an erroneous conclusion. The failure to give just importance to the difference between a legal status and a natural relation is the error that invalidates the reasoning in that case, for the court there affirmed the existence of the status, but stripped it of the incidents inseparately annexed to it, and this was a plain violation of the logical principle that where properties necessarily inhere in the thing, they can not be separated from it. Having affirmed the existence of the legal status, the properties inseparably connected with it should also have been affirmed as governing facts in the case. That we are right in our view is evidenced by the summing up of the result of the reasoning in that case. "In such case," said the court, in speaking of the adoption by the father only, "the child might inherit from the adopted father, but not from his wife. He would have an adopted father, but not an adopted mother. He would have no right as her child." This, surely, is a full recognition of the status of the adopted child, and if it be, then the correlative relation of father must also exist. What was decided in *Hole v. Robbins*, 53 Wis. 514, is shown in the concluding statement of the opinion, which reads thus : "In the case at bar, the property which is claimed by the adopted parents came to the child from the natural parents, and justice would seem to demand that it should descend to them or their kindred upon his death ; and there being nothing in the statutes concerning the adoption of children which clearly indicates an intention on the part of the legislature to change the order of descent from the adopted child, we must, upon authority and principle, hold that the property descends according to the general law

regulating the descent of real estate." It will be readily perceived that the decision from which we have quoted can not be authority to prove that the natural heirs shall take, to the exclusion of a surviving adoptive parent, property which the child acquired solely by virtue of his legal status, or that the status of the adoptive child is not, as to all legal incidents, the same as that of a natural child.

The point of the decision in *Wagner v. Varner*, 50 Iowa, 532, is, that where a father adopted two children of his daughter, and afterward died, leaving no will, the children so adopted inherited from him as his own children, and inherited also the share of their deceased mother. The court said: "By the act of adoption these children became in a legal sense the children of John Bumer." This is an explicit declaration of the legal status created "by the event" of adoption.

In *Keegan v. Geraghty*, 101 Ill. 26, the court held that the adoptive child could only inherit from the adoptive parents, and could not inherit from the lineal or collateral heirs of the parents, and this ruling, it is clear, does not controvert the proposition that the status is the correlative one of parent and child. The case of *Reinders v. Koppelman*, 68 Mo. 482, decides that the status of parent and child exists, but that the right of inheritance is, by force of the statute, vested only in the child, thus narrowing the whole question to the one statute.

The authorities we have discussed unite in affirming that the status of an adoptive child for all legal purposes, and as to the property inherited from an adoptive parent, is that of a natural child. This supplies a premise which guarantees the conclusion that the adoptive father must inherit from it property which came to it from his wife and the child's adoptive mother. It is indeed the only logical conclusion deducible from the premise granted. If there is a child, there must be a parent. The status of child necessarily imports that of parent. From this conclusion there is no escape unless logic is defied or disregarded. Parent and child are correlative terms, the one relation implies the other. It is logically impossible to conceive the relation of child without in the same conception implying that of parent. To affirm that there is a child is to affirm upon axiomatic principles that there is a parent, for one correlative implies the existence of that of which it is the correlative. The logicians thus state this logical principle: "Where the

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terms are correlative in the same subject, if one is predicated of the subject the other must be also." If then we predicate of the subject property inherited from an adoptive mother, the status, child, we must predicate of the same subject the correlative status, father.

It is, as we have seen, the legal status of the person respecting the subject that determines his legal rights. To again quote from Austin: "The law of persons is the law of status or conditions. * * * The rights and duties, capacities and incapacities which constitute a status or condition, are commonly considerable in number and various in kind. * * * Such are the rights and duties, capacities and incapacities of husband and wife, parent and child, guardian and ward." 2 Austin Juris. 709, 711. As the status of the surviving husband and adoptive father is that of father, his interest in the land which the deceased child held in virtue of the rights vested in it by adoption is that of a father, since it is of that property, as the subject, that the status of parent and child is predicated. This is a just as well as a logical result. It is not to be presumed that the legislature meant to violate logical rules by creating the legal relation of child without the corresponding one of parent, nor that they meant to thrust out the surviving husband and father for the benefit of a person that was a stranger to the ancestor who was the source of title.

Not only is the conclusion which we have stated that to which the cold rules of logic and the benign ones of natural equity lead, but it is also the conclusion to which the general principles both of the American law and the Roman law lead. It is a principle of both systems of jurisprudence, that in case of failure of descendants capable of taking, the inheritance shall go back to the kinsman of the blood from which it came. Our statute fully recognizes this general principle, for it provides that when the inheritance comes from the paternal line, it shall go back to the kinsman of that blood, but when the inheritance comes from the maternal line, it shall go back to the kinsman of the mother's side. R. S., 1881, § 2471. In analogy to this general principle it should be held that one connected by so close a relationship as that of husband should be preferred to a person who bore no relationship whatever to the ancestor. It must be presumed that the legislature meant the statute for adoption of children to confer rights consistent with the general policy of the law, and not to produce discord by breaking the unity of the

general system. To produce uniformity and harmony, it must be held, as we now hold, that the death of the adoptive child casts the inheritance which came to him through the joint adoption, back to his adoptive father, and not upon the natural mother who was an utter stranger to the person from whom the title flowed. It may be that this would require that what the adoptive child inherits from its natural kinsman shall go back to them, but if so, it is a good result, for this is no more than just. This was the civil law and the principle is declared and enforced in two of the cases cited.

The rule which we adopt does not cut off the adoptive child from inheriting from its natural relatives. It may inherit from them and from its adoptive parents. This was the rule of the civil law. Sandars' Justinian, 105. The principle is declared in *Wagner v. Varner*, *supra*, where it was said: "Because of the adoption the child acquires certain additional rights; but there is nothing in the act of adoption which in and of itself takes away other existing rights, or such as may subsequently accrue." The reason which supports this rule does not apply to the mother. She, in legal effect, severs all legal rights to the property which the child may acquire by virtue of its status to the adoptive parents, for as to that property, she permits the correlative relation of parent and child to exist between the child and the adoptive parents. It does her no injustice to leave her with her right to such property as her child may acquire otherwise than through the adoptive parents, but it would do great injustice to permit her to secure the property acquired by her child in virtue of both its natural and adoptive rights.

If it be the law that an adoptive parent can not inherit from the child of his adoption in such a case as this, then most harsh and unjust consequences will result from the law. We suggest one instance where this would be the result: A child is adopted by a husband and wife, the wife dies the owner of \$100,000 of real estate, then the child dies, without a natural kinsman, near or remote, and the result (if the law be that the adoptive father can not inherit) is that two-thirds of the land escheats to the State. We have put this case because it is not an improbable one, for many children who are adopted into families are waifs whose parents and kinsmen are unknown. We are not willing to declare a rule that will lead to such results.

The Supreme Court of Missouri recognize and lament the injustice

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of the rule which it adopts, for we find in the opinion this language: "It may seem great injustice that the property derived from one source should go in a channel never contemplated by the donor." In speaking of the rule of the Code Napoleon and of the civil law, that the property which came to the child from its natural kinsmen shall go back to them, and that when the estate came from the adoptive parents, it should go back to these parents. The court said: "Such a provision commends itself to our sense of justice, but it is not in our statute. What changes, if any, were intended to be made in our statute of descents in connection with this law of adoption is a mere matter of conjecture, and we have no authority to depart from the rules of descent established in the general statute on that subject." We concur with that learned court in its denunciation of the rule it adopts, but we can not think that it was necessary to adopt it. We are convinced that the court, in *Barnhizel v. Ferrell*, *supra*, and in the case from which we have quoted, took entirely too narrow a survey of the question. A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look to other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. *Taylor v. Board*, *etc.*, 67 Ind. 383; *State v. Swope*, 7 Ind. 91; *Prather v. Jeffersonville*, *etc.*, R. Co., 52 Ind. 16; *Allison v. Hubbell*, 17 Ind. 559; *Aurora*, *etc.*, R. Co. v. *City of Lawrenceburgh*, 56 Ind. 80; *Heitrick v. Kramer*, 43 Ind. 362. As it was said in *Aurora*, *etc.*, R. Co. v. *City of Lawrenceburgh*, *supra*, "Construction has ever been a potent agent in harmonizing the operation of statutes with equity and justice." Statutes are to be so construed as to make the law one uniform system, not a collection of diverse and disjointed fragments. When this principle of construction is adopted, "an enactment of to-day has the benefit of judicial renderings extending back through centuries of past litigation." Bish. Writ. Laws, § 242b. "A statute," says the author just referred to, "must be construed equally by itself and

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by the rest of the law. The mind of the interpreter, if narrow, will stumble." "The completed doctrine, resulting from a bringing together of its parts, is, that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting, and extending one another into one system of jurisprudence, as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms." Bish. Writ. Laws, §§ 113a, 86.

Petition for rehearing overruled.

Judgment affirmed.

ATLAS ENGINE WORKS V. RANDALL.

(100 Ind. 303.)

Master and servant — dangerous machinery — evident peril — contributory negligence.

Although a master may have directed a servant, through his superintendent, to wipe off a machine while in motion, without caution as to the danger of so doing, yet if the danger is apparent and the servant in doing so allows the waste which he is using for the purpose to hang down and be caught in the cog-wheels below, this is fatal contributory negligence.*

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

B. Harrison, W. H. H. Miller and J. B. Ham, for appellant.

H. N. Spaan, for appellee.

MITCHELL, J. This action was brought by Louis E. Randall to recover damages for an injury sustained by him while in the service of the Atlas Engine Works.

The evidence tended to show that the appellee was within a few days of nineteen years old at the time he engaged in the appellant's service; that he was an intelligent, active young man, having the ordinary experience and development of persons of that age; that he had worked some about a blacksmith shop, at farming and

* See *Fones v. Phillips* (39 Ark. 17), 43 Am. Rep. 264; *Williams v. Churchill*, ante, 304.

bridge building, but had no particular experience with machinery such as that used in the appellant's shops.

He was employed by the superintendent of the appellant's boiler department as a helper to one Smith Walker, whose business was to attend to the operation of a certain machine called a "flange punch," which was a machine used for drilling or punching holes in boiler iron. The evidence tended to show that he was subject to the direction of Walker, so far as receiving from him instructions as to his duties in connection with the operation of this machine. This machine consisted of a heavy iron frame four or five feet in length, and about twelve or fourteen inches wide, and of suitable height, and had, as part of its gearing, to give motion to the punch which was adjusted to it, two cog-wheels indenting into each other, the larger of which was forty-two inches in diameter, and the smaller seven inches. These were operated by a belt passing over a pulley connected with the machine, thence passing over a pulley on a line-shaft attached to the building. When in motion, the evidence tended to show that the larger cog-wheel made from forty to fifty revolutions per minute, and the smaller one about two hundred, and that the point of its indentation of the two wheels was about nine inches from the top of the frame and from three to five inches out from the side of the body or frame.

The plaintiff testified that on the fifth day after he entered the defendant's service, he was directed by Walker to procure some "waste" from the tool-room, and during the temporary absence of Walker from the machine, wipe off the top of the frame, while the wheels were in motion. He also testified that he was not cautioned by Walker, or any one else, concerning the danger of getting his hands or person into the cog-wheels, and that he had no directions how to prevent his hands from becoming involved in these wheels while wiping off the top of the frame. On the other hand, Walker testified that he was temporarily called away from his post by the superintendent; that he gave the appellee no directions to wipe off the machine at all; that there was no particular necessity for wiping it off at that time; and that he had on several occasions before that cautioned him not to get his "hands in the cog-wheels" and not to go too close to the wheels.

While engaged in wiping off the top of the frame of this machine, the appellee's hand was caught between the cog-wheels, and was so crushed and lacerated that the loss of all, save the thumb and one finger, resulted.

It was shown that after the injury the cog-wheels were covered, or "boxed," as it is termed, and that the danger in leaving the wheels exposed was not so much to persons at work with or about the machine, as to persons passing by it.

The injury appears to have occurred in this way : While the appellee was wiping off the top of the machine, instead of holding the "waste" compactly in his hand, he allowed shreds or ends of it to dangle below his hand, and the ends so hanging down becoming involved in the cog-wheels, his hand was drawn into the wheels and injured as described.

There was a general verdict for the plaintiff below, and with the general verdict the jury returned answers to special interrogatories.

By these answers the jury returned that the plaintiff and Smith Walker were co-employees, and that he was a young man about nineteen years old at the time of the injury, of average intelligence and capacity, and that the danger from the cog-wheels was apparent to any person of ordinary intelligence and capacity.

Over motions for a new trial, and for judgment on the special findings of the jury, the plaintiff had judgment.

Counsel for appellant contend that there is a fatal variance in the proof as to some of the essential averments in the complaint.

It is averred in the complaint that the machine at which the plaintiff was injured was defective in construction, in that it required frequent cleaning, and could not be stopped for that purpose, but had to be cleaned while in motion ; that the cog-wheels, being exposed and without covering, were a source of constant danger to those operating the machine, and that the defendant, with full knowledge of the plaintiff's youth and inexperience, "directed, ordered and compelled" him to clean it while in motion.

It is insisted that there was no evidence whatever showing that the defendant ordered, directed or compelled the plaintiff to clean the machine while it was in motion. From the evidence given, the jury may have found that Randall was employed by the superintendent of the boiler department, and that he was subject to Walker's orders. There is also evidence from which it may have been found that Walker directed him to wipe off the top of the machine while it was in motion, without giving him any caution with respect to the danger of so doing.

The argument of counsel is that Walker and Randall were fellow

servants engaged in the same general employment, and conceding that Walker did order or direct him as claimed, without giving notice or proper caution, yet as this was but the negligence of a fellow servant, it is said this cannot be imputed to the master. So far as the service in which they were engaged pertained to common employment, in operating the machine, they were both doubt fellow servants. If either sustained an injury from the negligence of the other, while so engaged, the master is not liable. It is claimed however that the appellee was put under subjection to Walker, and that he was directed to obey his orders, and that he was not cautioned of the danger of the particular service required of him when he received the injury.

One of the well recognized duties of a master is not to expose an inexperienced servant, at whose hands he requires a dangerous service, to such danger without giving him warning. The master must also give him such instruction as will enable him to avoid injury, unless both the danger and the means of avoiding it while performing the service required are apparent. These are obligations of the master, and he cannot exempt himself from liability by delegating his power to command the servant to another upon whom the obligation to instruct and caution is also imposed.

If the agent or servant upon whom the power to command is given exercises the power, and fails to discharge the obligation, the hurt of the servant who is without fault, the failure is that of the master, and he must respond.

The master having subjected the servant to the command of another without information or caution with respect to all such obligations as the master owes, the other stands in the master's place, and this is so notwithstanding the two servants are, as regards the common employment, fellow-servants.

If the master has by general or special instructions defined the duty and authority of each with respect to the other, or given instructions covering the subject of their employment, so as to leave no authority to the one over the other, or so as to point out the danger of the service and the means of avoiding such danger, the rule can have no application. *Mitchell v. Robinson*, 80 Ind. 100; s. c., 41 Am. Rep. 812; *Indiana Car Co. v. Parker*, 100 Ind. 100; *Railroad Co. v. Fort*, 17 Wall. 553; *Lalor v. Chicago, etc., R. Co.*, 111 Ill. 401; s. c., 4 Am. Rep. 616; *Brabbitts v. Chicago, etc., R. Co.*, 111 Wis. 289; *King v. Ohio, etc., R. Co.*, 8 Am. & Eng. R. Cases, 111.

Shanny v. Androsoggin Mills, 66 Me. 420; *Baxter v. Roberts*, 44 Cal. 187; s. c., 13 Am. Rep. 160; *Atchison, etc., R. Co. v. Holt*, 29 Kans. 149; *Cooley Torts*, 553 to 563, and notes; 2 *Thomp. Neg.* 976, 978, 979, 1028 to 1033.

As applicable to the facts and circumstances developed in this case, two things were material to be proved in order to fix the liability of the appellant: 1. That the danger to which the appellee was exposed, and which was the proximate cause of the injury, was one which was known, or might reasonably have been apprehended by the appellant. 2. That such danger was one which, by the exercise of the faculties of the appellee, when directed to the thing he was commanded to do, was not open to his observation and apprehension, assuming that he was giving care and attention to the work required of him. Upon both of these propositions we think the proof falls short of making out the case.

The proximate cause of the injury grew out of the fact that the appellee, in wiping off the top of the machine, needlessly held the waste in his hand in such manner as to permit the ends or parts of it to hang down about nine inches below, and from three to five inches out from the top line of the frame, and by that means to become involved in the revolving cog-wheels. Conceding that Walker directed him to wipe off the machine with waste, and that he gave him no caution, about which there is serious dispute, yet he could not know or reasonably apprehend that he would do it in the manner described. The act of the appellee in permitting the substance employed in wiping the machine to hang down in the manner stated, presumably under his immediate observation, was a thing, under the circumstances, so highly improper and unnecessary in any possible contingency, that the foreman could not reasonably have anticipated that it might occur. A reasonably prudent and cautious foreman might well believe that the work could be safely done, if done in a manner which the appearances and exigencies of the situation itself would suggest to a person nineteen years old, and he had a right to rely upon the fact that what he directed to be done would be done with due regard to all the hazards which were open to the perception, and which must lie immediately under the eyesight of the appellee, if he was giving attention to the very thing which he was directed to do. Ordinary, usual or probable consequences resulting from attentive application to the service demanded, the foreman was bound to anticipate and caution against,

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but he was not bound to anticipate extraordinary, unusual and improbable occurrences which involved inattention on the part of the appellee. And so as to the other requisite to the appellant's liability, it seems clear to us, upon the appellee's own statement, that if he had been giving attention to what he was doing, the injury would not have occurred.

Every hypothesis upon which the facts can be considered fails to account for the accident and resulting injury, except that which assumes that the appellee was not giving attention to his hands and the manner in which the waste was held.

As was said by COOLEY, J., in the case of *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466; s. c., 8 Am. & Eng. R. R. Cas. 135: "It was thus made to appear by his own examination that he was not sent into unknown dangers, and that he was not exposed to risks which he, through immaturity or for any other reason, failed to comprehend."

Contributory negligence on the part of a minor, when it is established, will defeat his right to recover for an injury, precisely as in the case of an adult. *Chicago, etc., Ry. Co. v. Harney*, 28 Ind. 28; *Umback v. Lake Shore, etc., Ry. Co.*, 83 Ind. 191; *Brazil, etc., Co. v. Cain*, 98 Ind. 282. The case is plainly distinguishable from *Hill v. Gust*, 55 Ind. 45, and the case of *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; s. c., 3 Am. Rep. 506, cited therein.

In the first case, a boy was compelled to drive and manage a wild, fractious horse, on a high embankment between two trains of steam cars, and while in that situation he was injured by the horse getting beyond his control, and it was held in that as in the case cited and relied on, that the mere fact that he could have seen that such place was dangerous, by exercising his faculty of sight, was not sufficient to defeat his right to recover. In that case, the minor was compelled to go into a situation, highly dangerous, charged with the management of a horse whose control was beyond his strength. No degree of attention or strength at his command was of any avail. The parallel between that case and this is lost as soon as the two are stated. And so in the Massachusetts case, in which a boy, fourteen years old, was injured by coming in contact with one machine which was left unguarded, and in such close proximity to another at which he was employed, that in doing his work in the manner he was instructed to do it, his hand was brought in contact with the unguarded machine and injured. In

that case the attention of the boy was necessarily directed to the machine at which he was engaged, and not to the unguarded machine which inflicted the injury. While here the very duty which the appellee was required to perform was such that every moment his attention was given to it the danger of the situation was apparent, and the means of evading it simply of his own volition. If the attention of the appellee had been, as in the Massachusetts case, withdrawn from the source of danger by the requirements of his employment, the case would involve considerations which are conspicuously absent. For a case in all respects parallel, see *Shanny v. Androscoggin Mills*, 66 Me. 420.

Where an inexperienced servant is required to perform a hazardous service, in the performance of which extraordinary caution or peculiar skill is required, in order to enable him to avoid dangers which may be apparent, it may be a question for a jury to determine whether under all circumstances the master gave sufficient caution of the danger or adequate information of the means necessary to avoid it, or whether the servant was guilty of contributory negligence in not avoiding it. But the evidence in this record fails to make a case of that character. So far as appears from the evidence in this case, no extraordinary caution or peculiar skill was necessary to avoid the injury sustained. Nothing was necessary except that the appellee should give attention to his hands, over which he had complete control.

The conclusion at which we have arrived is, that upon the facts as presented by the evidence in the record, this must be held to be a case in which both parties had equal knowledge of the danger of the service required, and of the means of avoiding it. Both had equal knowledge of the consequences which would result if the appellee allowed his hands to become involved in the cog-wheels, and both knew that the only means necessary to avoid that result were nothing more than that the appellee should give attention to the work which he was set to do. The appellant had a right to expect such attention.

It is suggested that upon the special findings of the jury judgment should have been rendered for the appellant notwithstanding the general verdict. This view does not seem to be seriously pressed, and while there might be some difficulty in sustaining the general verdict as against the special findings, yet we think if it could be said that it was in all other respects sustained by the evidence,

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there may be some theory upon which it might stand notwithstanding the special findings.

Some instructions were asked and refused, and some given by the court, upon which error is predicated, but it is believed no useful purpose can be subserved by prolonging this opinion with a particular examination of the instructions given or refused.

Judgment reversed with costs.

Judgment reversed.

HARRISON V. WRIGHT.

(100 Ind. 515.)

Bank — banker's check — equitable assignment.

A bank cashier's check, drawn on a bank in another State, on no particular fund, is not a bill of exchange, and does not operate as an assignment of the fund, and the holder is not entitled to preference over depositors and general creditors of the insolvent drawee.*

ACTION by receiver to ascertain rights to fund. The opinion states the case.

S. Claypool, W. A. Ketcham, B. Harrison, C. C. Hines, W. H. H. Miller and J. B. Elam, for appellant.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, T. L. Sullivan, A. Q. Jones, C. A. Dryer, L. Howland, C. Byfield and M. Moores, for appellees.

ZOLLARS, C. J. The Indiana Banking Company, a partnership engaged in the business of banking, suspended payment on the morning of August 10th, 1883.

At the time of the suspension, there were outstanding checks or drafts drawn by the banking company in favor of various parties, and upon different banks in different cities. These drafts had been drawn at different dates, ranging from the preceding April, up to and on the day preceding the suspension. Some of these check-holders were depositors with the Indiana Banking Company, and

* See *Creseling v. Bloomsbury Nat. Bk.* (46 N. J. Law, 255), *ante*, 417.

purchased the checks, by checks upon their deposits in the bank. Others who were not depositors, paid the cash for their checks. Some of the checks too were given for collections made by the banking company for the payees named therein.

At the time of the suspension, the Indiana Banking Company had sufficient funds in each of the banks to meet all checks drawn upon it, except the United States National Bank of New York. To supply this bank with funds to meet the checks upon it, the Indiana Banking Company made checks in its favor upon banks in Baltimore and Philadelphia, and forwarded them to it for credit, on the evening before the suspension. These banks held sufficient funds of the Indiana Banking Company, and if they had paid the checks, sufficient funds would have gone in the usual course of mail to the New York bank to have met all checks drawn upon it.

Upon hearing of the failure of the Indiana Banking Company, the Baltimore and Philadelphia banks declined to pay these checks and yet hold the funds, subject to the order of the Indiana Banking Company or its receiver.

At the time of the suspension, the New York bank had some funds of the Indiana Banking Company, and paid them out upon its checks. After these funds were thus exhausted and the Baltimore and Philadelphia banks refused to pay, the New York bank returned the checks in its favor to the receiver of the Indiana Banking Company. All of the checks were duly presented to the banks upon which they were drawn within a reasonable time after the failure of the Indiana Banking Company. This company issued the several checks in the usual course of business, the managers hoping and believing until the morning of the 10th of August, that they would be able to maintain its credit, and go on with the business of the bank.

The assets of the Indiana Banking Company have passed to the receiver herein, appointed by the court, and he is charged with the duty of settling its affairs. The assets are not sufficient to pay the depositors and other debts in full.

The check-holders claim that they should be preferred, and paid in full, and thus they make an issue with the general creditors. The receiver commenced this action to have an adjudication of the rights of these several parties. Differing only as to amounts, the number and date, the names of payees, and the names of the drawees (banks), the checks were as follows :

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"No. ——— INDIANAPOLIS, Ind., —, 1883.
 "Pay to the order of —————,
 ————— Dollars.
 "—————, Cashier.

"To the United States National Bank, New York."

The contention of the check-holders is : First. That the checks are ordinary bankers' checks, and that the drawing and delivery of them operated as an equitable assignment to them, *pro tanto*, of the funds of the Indiana Banking Company in the hands of the drawees ; and second, that whether this is so or not, to the extent of making the drawees liable to the payees, they operated as an equitable assignment as between the Indiana Banking Company and the payees of the checks, and as the receiver takes the place of the bank in this regard, that equity should be enforced against him, and they be paid in full.

Some of the cases hold to this distinction, while others disregard it. For convenience, we group the cases into three classes :

First. A class which holds that the drawing and delivering of a check do not operate as an assignment, in any sense, of the drawer's rights against the drawee, nor of funds upon which it is drawn, nor give the payee or holder any rights as against the drawee, unless in some way the check is accepted by such drawee; and that hence, as between the drawer and payee or holder, the check does not operate as an assignment of the fund drawn upon, or of the drawer's rights as against the drawee.

Second. Another class of cases holds that the drawing and delivery of a check operate as an equitable assignment, *pro tanto*, of the fund in the hands of the drawees, and give the holder the right to collect from the drawee by suit. These cases of course hold also that a check operates as an assignment as between the drawer and payee.

Third. Another class seems to hold that whether a check has this effect or not, it operates as an equitable assignment as between the drawer and payee.

On account of the diversity of rulings by the different courts, and the diverse reasons upon which they are founded, the importance of the questions involved and the facts that a decision of this court is assailed, it seems necessary that we should examine the theories advanced by either side in this case, and the rulings by

other courts. Thus far we have used the term "check" in speaking of the papers issued by the Indiana Banking Company. It is contended however by the appellant, that they are not checks, but ordinary bills of exchange. Here again the cases and the law-writers are in sharp conflict. We think that upon the weight of authority, and the better reason, the papers issued by the Indiana Banking Company should be considered and held to be banker's checks, drawn by one bank upon another bank. In the case of *Griffin v. Kemp*, 46 Ind. 172, in speaking of checks, this court said: "A check is defined to be a written order or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment, to another person * * * a certain sum of money specified in the instrument. It has been said that checks have many resemblances to bills of exchange, and are in many respects governed by the same rules and principles as the latter. But *nil- lum simile est idem*, and their nature, obligation, and character are in some respects different from those of common bills of exchange. The circumstances in which they principally differ from bills of exchange or at least from bills of exchange in ordinary use and circulation, are: 1st. They are always drawn on a bank or on bankers, and are payable on presentment without any days of grace. 2d. They require no acceptance as distinct from prompt payment. 3d. They are always supposed to be drawn upon a previous deposit of funds. * * * A check so far differs from a bill of exchange or note, that its payment may be countermanded by the drawer before it is accepted or paid by the bank."

In the case of *Henshaw v. Root*, 60 Ind. 220, it was said that delay in giving notice of non-payment does not discharge the drawer of a check from liability, unless damage results from such delay, and then only to the extent of the damages sustained. This of course is not true of a bill of exchange. *Purcell v. Allemong*, 22 Gratt. 739.

In the case of *First Nat'l Bank of Cincinnati v. Coates*, 3 McCrary, 9, it was held that a draft by one bank upon another bank is a check, though it is apparent on its face that the drawer and drawee are residents of different States.

In the case of *Rosenthal v. Mastin Bank*, 17 Blatchf. 318, a draft by a bank in Missouri on a bank in New York was treated as a banker's check. See also *Moses v. Franklin Bank of Baltimore*,

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34 Md. 574; *Planters' Bank v. Keesee*, 7 Heisk. 200; *Planters' Bank v. Merritt*, 7 Heisk. 177; *Lester & Co. v. Given, Jones & Co.*, 8 Bush, 357.

FIRST CLASS.

Treating these checks as such, did the simple issuing and delivery of them, under the circumstances, without further agreement, operate as an equitable assignment of the funds drawn upon, as between the payees and drawees, or give the payees any right of action against the drawees? It was held by this court in the case of *Nat'l Bank of Rockville v. Second Nat'l Bank of Lafayette*, 69 Ind. 479; s. c., 55 Am. Rep. 236, that the payee of a bank check cannot maintain an action against the drawee, unless the check has been accepted by the drawee. This is the case assailed by appellees, the holders and payees of the checks. The conclusion reached in the case is sustained by the earlier case of *Griffin v. Kemp*, 46 Ind. 172, where it was said: "Although there are cases to the contrary, it seems clear upon principle and by the great weight of authority, that the holder of a check cannot sue the bank for refusing payment, in the absence of proof that the check was accepted by the bank, or the amount thereof charged against the drawer." It is also in accordance with the rulings of the English courts, and the Supreme Courts of the United States, Louisiana, New York, Massachusetts, Pennsylvania, Michigan, Tennessee, Virginia, New Jersey, Missouri, most of the United States Circuit and District Courts, Parsons on Notes and Bills, Morse on Banks and Banking, Grant on Banking, and all of the law writers, as we now recollect, except Mr. Daniel in his work on Negotiable Instruments.

The case of *Griffin v. Kemp*, *supra*, was based upon the case of the *Bank of the Republic v. Millard*, 10 Wall. 152, which seems to be treated as a leading case, partly perhaps on account of the high authority from which it emanates. That was an action by the payee of an unaccepted bank check against the bank upon which it was drawn, and it was held that he could not recover.

The court said: "As checks on bankers are in constant use and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the status which the holder of a check sustains toward the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also in such a state of ^{case} sue the bank? It

is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. * * * The right of the depositor, as was said by an eminent judge, is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person without the assent of the depository."

It was said further, that the relation between the depositor and depository is that of creditor and debtor; that the money deposited becomes the money of the depository, to be used and loaned as its own, as it may choose; that the contract is purely a legal one, without any element of trust whatever. It was said further, that it may be, that if it could be shown that the depository has charged the depositor with the amount of the check, the payee might recover, as for money had and received.

The case of *First Nat. Bank v. Whitman*, 94 U. S. 343, was an action by the payee of a check against the depository. The reasoning in the above case was adopted.

In the case of *Case v. Henderson*, 23 La. Ann. 49; s. c., 8 Am. Rep. 590, it was held that the payee and holder of a check upon a bank could not set it off against a note which the bank held against him. The decision is based upon the case of *Bank of the Republic v. Millard*, *supra*.

The case of *Dykens v. Leather Manufacturers' Bank*, 11 Paige, 612, was an action by the check-holder against the bank upon which it was drawn. It was held by the chancellor that he could not recover. After the check was drawn and delivered to the payee, the drawer

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notified the bank not to pay it, and after the payee had demanded payment of the bank the drawer withdrew his deposits. It was said that priority of a check does not entitle the holder to priority of payment, and that when several checks are drawn on a deposit, the bank is not bound to settle priorities; that it would be impossible for banks to do business if they were bound to settle conflicting claims of check-holders; that at any time before acceptance and payment the drawer may countermand the check; that the drawing and delivery of a check do not operate as a specific appropriation, *pro tanto*, of the fund upon which it is drawn, to the exclusion of subsequent checks, and that the rule as to the assignment of particular funds cannot be applied to checks. The ruling has been adhered to in the State of New York. See *Chapman v. White*, 2 Seld. 412; *Risley v. Phenix Bank*, 83 N. Y. 318; s. c., 38 Am. Rep. 421; *Duncan v. Berlin*, 60 N. Y. 151; *People v. Merchants, etc., Bank*, 78 N. Y. 269; s. c., 34 Am. Rep. 532.

In the case of *Carr v. Nat'l Security Bank*, 107 Mass. 45; s. c., 9 Am. Rep. 6, was an action by the holder of a check against the drawee. It was based in part upon a special agreement by the bank with the depositor, to pay all checks that he might draw upon it to the extent of the fund deposited. It was held that the relation between the depositor and bank was that of creditor and debtor, and not of principal and agent, or trustee and *cestui que trust*; that the check did not operate to transfer any interest in the fund, either legal or equitable; that while the dishonor of the check would render the bank liable to the drawer, the payee could not maintain an action against it, and that the general agreement of the bank to pay all checks drawn upon it by the depositor could not be taken advantage of by the check-holders as a promise made for their benefit, because when the promise was made, it was not known who the check-holders would be, nor the amount of the checks they might hold.

In the case of *Loyd v. McCaffrey*, 46 Penn. St. 410, it was held that a check upon a banker is not, of itself, an appropriation of the funds in his hands belonging to the drawer, unless it plainly appears that the fund claimed was the one designated, out of which payment was to be made; and that an agreement between the drawer, payee and banker, that if an attachment was levied on the drawer's funds, the check should at once be passed to the credit of the payee, and charged to the drawer, did not amount to an assign-

ment, or raise a trust in favor of the payee ; nor was it a present appropriation of the money.

In the case of *Second Nat'l Bank v. Williams*, 13 Mich. 283, it was held that without acceptance by the bank, or some special undertaking on its part, the bank could not be held liable upon a check, even though drawn for the full amount of the deposit ; that in such case there is no privity between the payee and drawee ; that the only remedy of the former is against the drawer, and that the payee does not take an unaccepted check, relying upon the credit of the drawee, but upon that of the drawer.

The Supreme Court of Tennessee, in the case of *Planters' Bank v. Merrill*, *supra*, approved of the ruling in *Bank of Republic v. Millard*, *supra*, and held that the holder and payee of a check or draft, drawn by a bank in Tennessee upon a bank in New Orleans, had no right of action on the check against the New Orleans bank.

In the case of *Moses v. Franklin Bank of Baltimore*, 34 Md. 574, it was held that a check does not operate as an assignment, *pro tanto*, of the fund upon which it is drawn, until it is accepted, or certified to be good by the bank holding the funds ; that the bank upon which it is drawn cannot be held liable to the payee on the check itself ; that the obligation of the bank upon which a check is drawn by a depositor to accept and pay is not to the holder of the check, but to the drawer, and that therefore the bank is bound to obey the instructions of the drawer not to pay. See also *Purcell v. Allemong*, 22 Gratt. 739. Also U. S. Circuit Courts : *Essex County Nat'l Bank v. Bank of Montreal*, 7 Biss. 193 ; *A. & R. Strain v. Courdin*, 11 Nat. Bk. Reg. 156 ; *Rosenthal v. Mastin Bank*, *supra* ; *German Savings Institution v. Adae*, 1 McCrary, 501.

Mr. Morse, in his work on Banks and Banking, at page 275, says : " A check which has not been accepted by the bank on which it is drawn, does not operate as an assignment to the payee of the sum for which it is given." Parsons, in his work on Notes and Bills, vol. 2, p. 60, *et seq.*, states the same rule, and cites numerous cases in support of it, among them English cases.

In the case of *Hopkinson v. Forster*, L. R., 19 Eq. 74, it was held by the English court that a check is clearly not an assignment of money in the hands of a banker, and that a banker who dishonors it is not liable to a suit in equity by the holder. See also *Bellamy v. Majoribanks*, 8 Eng. L. & Eq. 513 ; *Creveling v. Bloomsbury Nat'l*

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Bank, 46 N. J. L. 255; s. c., *ante*, 417. Many other cases to the same effect might be cited. The same rule has been applied to bills of exchange. 1 Pars. Notes and Bills, 330-1; *Bank of Commerce v. Bogy*, 44 Mo. 1; *Kimball v. Donald*, 20 Mo. 577; *Jones v. Pacific Wood, etc., Co.*, 13 Nev. 359; s. c., 29 Am. Rep. 308; *Hopkins v. Beebe*, 26 Penn. St. 85; *Wheeler v. Stone*, 4 Gill, 38; *Bush v. Foote*, 58 Miss. 5; s. c., 38 Am. Rep. 310; *Sands v. Matthews*, 27 Ala. 399; *First Nat. Bank, etc., v. Dubuque, etc., Ry. Co.*, 52 Iowa, 378; s. c., 35 Am. Rep. 280.

Of course there is a difference between bank checks and bills of exchange, as we have seen, but there is enough similarity to make the adjudications upon one of some weight upon the other.

In accord with these cases are the cases holding that a check does not operate as an assignment as between the drawer and payee, or in any way give the payee or holder of the check a preference as against the general creditors of the drawer.

The facts in the case of *People v. Merchants, etc., Bank*, 78 N. Y. 269, were as follows: A. gave a check upon a bank in Troy, in which he was a depositor. The check became the property of a bank in New York, which forwarded it to the Troy bank for payment. The Troy bank charged the depositor with the amount, returned the check to him as paid, and forwarded to the New York bank a check or draft for the amount upon another New York bank. This check was not paid, and the Troy bank passed into the hands of a receiver. The New York bank, holding the unpaid check, petitioned to have the receiver pay the check in full. The court held that this should not be done, and placed the holding on the ground that the relation of the depositor and depository is that of creditor and debtor, and that by the action of the Troy bank it became simply the debtor of the bank holding the check, without any element of trust, and that by accepting the check, instead of the cash, the New York bank trusted the Troy bank.

The case of *Attorney-General v. Continental L. Ins. Co.*, 71 N. Y. 325; s. c., 27 Am. Rep. 55, was an action by the payee of a check to have the receiver of the drawer pay the check in full, on the ground that as between the drawer and payee, the check operated as an equitable assignment. It was held that this could not be allowed. The ruling was placed substantially on the same ground as the case last above, with the additional reason, that such a holding is indispensably necessary to the safe transaction of com-

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mercial business. See also *Lunt v. Bank of North America*, 49 Barb. 291.

The facts in the recent case of *Grammel v. Carmer*, 19 Cent. L. J. 492, were as follows: A banker in Michigan sold a draft or check on a bank in New York, and before it was presented for payment made an assignment for the benefit of creditors. Payment was refused by the New York bank on account of the assignment. The action was by the payee of the check to have the assignee pay the check in full, on the ground that as between the drawer and payee it operated as an equitable assignment. It was held by the court, COOLEY, C. J., delivering the opinion (SHERWOOD dissenting), that the payee and holder of the check was not entitled to such preference.

The facts in the recent case of *Dickinson v. Coates*, 79 Mo. 250; a. c., 49 Am. Rep. 228, were as follows: The Mastin Bank of Kansas City drew a check or draft upon a New York bank, and before it was presented for payment made an assignment for the benefit of creditors. The assignee drew the funds from the New York bank. The action was against him to have the check paid in full, on the theory that the check worked an equitable assignment, and hence the assignee held the fund for the use of the holder of the check. The decision was adverse to this claim, and was based upon the ground that the relation of the depositor and depository was that of creditor and debtor, and that the check was not for the whole of the fund, nor for any particular fund, and contained no terms of transfer, and hence before acceptance did not work an equitable assignment. In a case that grew out of the failure of the same bank, and upon a state of facts, in all essentials, identical with the facts in the case last above, the same ruling was made by the U. S. Circuit in New York, by BLATCHFORD, J. *Rosenthal v. Mastin Bank*, *supra*. The same ruling was made in the case of *Winter v. Drury*, 1 Seld. 525. The same doctrine has been applied to bills of exchange.

It will be noticed, upon an examination of these cases and others holding the same doctrine, that they are in the main based upon the ground, that because the check does not operate as an equitable assignment as between the payee and the drawee, it does not as between the drawer and payee, and hence does not entitle the payee or holder to a preference. The case of *Coats v. First Nat. Bank of Emporia*, 91 N. Y. 20, is not in conflict with these cases. Recognizing the doctrine of former cases, it was held that the trans-

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action showed, as it did, that there was an intention to transfer, and a transfer of the fund.

SECOND CLASS OF CASES.

The case of *Munn v. Burch*, 25 Ill. 21, was an action by a checkholder against the bank upon which it was drawn. It was held that he could recover, and that upon presentation of the check, both the legal and equitable right to the money of the drawer in the hands of the bank passed to him. In the course of the opinion it was said, that upon receiving the deposit the bank impliedly agrees with the depositor to pay it out on the presentation of his checks, in such sums as those checks may call for, "and with the whole world he agrees that whoever shall become the owner of such check shall upon presentation thereby become the owner, and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit." It is said further: "Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker, on one side, and the receiving of the check for value and presenting it on the other." And still further: "It is a familiar principle of daily illustration, that a promise made to the public, that the performance of a particular act shall entitle the person performing the act to a particular right, is a valid assumpsit to such person." See *Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids*, 68 Ill. 398; *Chicago Marine, etc., Ins. Co. v. Stanford*, 28 Ill. 168; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212; s. c., 22 Am. Rep. 185. In this case it was further held, that after the check has passed to the hands of a *bona fide* holder, it is not in the power of the drawer to countermand the order of payment. See also *Brown v. Leckie*, 43 Ill. 497.

In the case of *Fogurties & Stillman v. State Bank*, 12 Rich. 518, the same ruling was made, and upon substantially the same ground as in Illinois cases. In the case of *Lester v. Given*, 8 Bush, 357, it was held that the payee of a check drawn in Kentucky upon a bank in New York could maintain an action against the bank, upon the ground that the check operated as an absolute appropriation of so much money in the hands of the drawee. The reasoning of the court seems to place a blank check upon the same basis as an order drawn upon a particular fund in the hands of the drawee.

In the case of *Weinstock v. Bellwood*, 12 Bush, 139, this case was interpreted as holding, "that the bank held the money as the mere bailee of the depositor."

Distinguishing a check from a bill of exchange, and placing the ruling upon substantially the same ground as in the Illinois cases, it was held in the case of *Roberts v. Austin Corbin & Co.*, 26 Iowa, 315, that the payee or holder of a check may recover the amount of it from the drawee.

In the cases of *McGrade v. German Saving Institution*, 4 Mo. App. 330, and *Senter v. Continental Bank*, 7 Mo. App. 532, after holding that the relation of the depositor and depository is that of creditor and debtor, that the original deposit in a strictly legal effect is a loan to the bank, and every payment a repayment of the loan *pro tanto*, it was held that the holder of the check could recover on the ground, that upon the presentation of a check, the holder is brought into privity with the depository by force of an implied agreement on the part of the depository to pay the depositor's checks, and this regardless of the fact, that at the time of the deposit the names of the check-holders and the amounts of their check are unknown; and further, that when the checks are presented for payment they operate an absolute appropriation of the fund drawn upon, and cannot be countermanded by the drawer. It should be observed that these cases, as authority in Missouri, are overthrown by the later case by the Supreme Court of that State. *Dickinson v. Coates*, *supra*. Thus we have the Supreme Courts of Illinois, Kentucky, Iowa and South Carolina arrayed against the cases examined under the first class. The conflict between these classes of cases is irreconcilable. And there is a want of harmony as to the grounds upon which the conclusions in each class are based. It is evident that much of the confusion is the result of a failure to properly observe the distinction between legal and equitable rights, legal and equitable remedies, and the innovations by modern statutes. Some of the cases in the first are purely cases at law. The reasons upon which the first class of cases are grounded may be summarized as follows:

1st. The relation between the depositor and depository is that of creditor and debtor, without any element of trust, and the right of the depositor is a chose in action, which is not transferred or subjected to a lien by the giving of a check, unless assented to by the drawee by accepting the check or otherwise.

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2d. The depositary cannot be subjected to different actions by different check-holders, because he has the right to insist upon a single payment of the deposit.

3d. A part of a chose in action cannot be assigned.

4th. A check, not being drawn upon a particular fund, does not work an assignment.

5th. There is no foundation for an action by the holder of a check, because there is no privity of contract between him and the drawee.

6th. If the holder can maintain an action against the drawee, there would be a right of action upon one promise, for the same thing, in two persons at the same time, the payee and drawer.

7th. If a check works an assignment as against the drawee, he would be compelled to pay, although the deposit might be exhausted by subsequent checks.

8th. The holder of the check cannot take advantage of the implied promise to pay the depositor's checks, because at the time the deposit is made, neither the name of the holder nor the amount of his check is known.

9th. Priority of checks does not entitle the holder to a priority of payment. Banks are not bound to settle conflicting claims of check-holders, and could not transact their business if compelled to do so.

10th. Checks may be countermanded at any time before acceptance or payment, and this could not be so if they operated as an equitable assignment.

11th. In the absence of any evidence, except what the check furnishes, it must be presumed that the payee takes the check upon the credit of the drawer.

Let us examine these reasons in the order above:

1st. That the bank does not hold an ordinary deposit as trustee, but by the deposit becomes the debtor of the depositor simply, and may use the money as it pleases, is well settled by authority. With one or two exceptions all of the above cases either concede or assert this. It is the doctrine of this court. *Coffin v. Anderson*, 4 Blackf. 395; *State ex rel. v. Clark*, 4 Ind. 315. See *Morse Bank-ing*, 28, and the numerous cases there cited.

2d and 3d. The rule that a chose in action, or part of a chose in action, cannot be assigned, is the rule of law, but it is not the rule in equity, and still less is it the rule under modern statutes, which

as in this State expressly authorize the assignments of choses in action, and direct that all actions shall be prosecuted in the name of the real party in interest. Under these statutes, no good reason is apparent why the assignee may not maintain an action at law. Pomeroy Eq., § 1277. But however that may be, in a case where the proceeding is clearly in equity, as here all interested parties being before the court, there can be no doubt that an assignment of a part of a chose in action, or fund, if really made, will be upheld and enforced, whether the debtor has assented thereto or not. *McFadden v. Wilson*, 96 Ind. 253, and cases there cited; *Wood v. Wallace*, 24 Ind. 226; Pom. Eq., § 1270, *et seq.*, and cases there cited.

In Story's Equity Jurisprudence, § 1044, it is said, after stating the rule at law: "But in cases of this sort, the transaction will have a very different operation in equity. Thus for instance if A. having a debt due to him from B. should order it to be paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of an assignment of a part of such debt. In each case, a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it." It may be added, too, that the depository bank is not in a position to make the point that the depositor's claim against it should not be called for in parts, as its implied contract with the depositors is to thus pay, at his pleasure. If therefore these reasons were the only ones against an equitable assignment by a check, they clearly would not be sufficient in equity and under our statutes.

4th and 5th. When it is once conceded that there may be an assignment of a chose in action, or of a fund, the argument of want of privity between the assignee and debtor or holder of the fund is disposed of, under the equitable and statutory rules.

If by the assignment the assignee acquires a legal right, it is by force of the statute, without regard to the assent of the debtor or holder of the fund. If he acquires an equitable assignment or right simply, under the rules in equity, this right is independent of any assent by the debtor or holder of the fund. After stating the rule at law as to the necessity of privity of contract, Mr. Pomeroy says: "The doctrine of equity is very different. Equity recognizes an interest in the fund, in the nature of an equitable property, obtained through the assignment, or the order which operates as an assign-

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ment, and permits such interest to be enforced by an action, even though the debtor or depositary has not assented to the transfer. It is an established doctrine, that an equitable assignment of a specific fund in the hands of a third person creates an equitable property in such fund. If therefore A. has a specific fund in the hands of B., or in other words, B. as a depositary or otherwise, holds a specific sum of money which he is bound to pay to A., and if A. agrees with C. that the money shall be paid to C., or assigns it to C., or gives to C. an order upon B. for the money, the agreement, assignment, or order creates an equitable interest or property in the fund in favor of the assignee C., and it is not necessary that B. should consent or promise to hold it for or pay it to such assignee." Pomeroy Eq., § 1280, and cases cited. Undoubtedly, under these rules, a part of a general fund or debt may be assigned. As to whether or not a check works such assignment, is a question to be considered hereafter. What we now hold is, that the simple facts that the fund or debt is a general one, and that there is no promise or assent to the assignment by the debtor or holder of the fund, are not insuperable barriers to such an assignment.

6th and 7th. We do not think these reasons conclusive or well taken. The actions by the holder and drawer of the check would not be for the same thing. If by the check, the holder becomes the legal or equitable owner of the chose in action, or of the fund upon which it is drawn, his action would be either legal or equitable, in proper cases, for the amount of the check. The action by the drawer for the dishonor of his check is not for the amount of the check, but for injury to his credit by the dishonor. *Whitaker v. Bank of England*, 6 C. & P. 700; *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Rolin v. Steward*, 14 C. B. 595; *Morse Banking*, 519; *Grant Banking*, 45, 69.

When a deposit is made in a bank, there is an implied promise on the part of the bank to the depositor, that it will pay such checks as he may draw, if at the time of their presentment, it is indebted to him on account of deposits.

It is for a violation of this promise that the drawer has an action against the bank for damage to his credit. The implied promise on the part of the bank is not to pay all the depositor's checks, whether it is indebted to him or not at the time the checks may be presented for payment, nor to pay in the order drawn, if at the time when drawn, it is indebted to him. If the check works but

an equitable assignment of the chose in action, or funds drawn upon, of course the bank could not be affected in any way until after proper notice, as up to that time the equity would be a secret equity, as to the bank.

8th. That a promise upon a good consideration, made for the benefit of third parties, may be taken advantage of, and enforced in equity by such third parties, is well settled. And the fact that at the time the promise is made the third parties are not aware of it, and they and the amount of their claims against the promisee are unknown to the promisor, makes no difference, under the decisions of this and other courts. For want of privity of contract between the promisor and such third parties, such contracts could not be enforced under the common law. We cite some of the cases: *Bird v. Lanins*, 7 Ind. 615; *Hurdy v. Blazer*, 29 Ind. 226, and cases there cited; *Devol v. McIntosh*, 23 Ind. 529; *Durham v. Bischof*, 47 Ind. 211; *Fisher v. Wilmoth*, 68 Ind. 449; *Miller v. Billingly*, 41 Ind. 489. It should be noted that in these cases, except perhaps one in which work was done on the faith of the promise, the claims of the third parties were in existence when the promise was made. *Loeb v. Weis*, 64 Ind. 285; *Heers v. Robinson*, 9 Penn. St. 229. And so promissory notes and bills of exchange, under some circumstances, and checks, where the holder is entitled to fill a blank with the name of the payee, are exceptions to the common-law rule as to privity of contract. In such cases of course the payee is not known at the time the check is issued. 2 Whart. Cont., § 795. These reasons of themselves therefore as broadly stated, we think, are not conclusive in support of the doctrine of the cases of the first class. This brings us naturally to the main reason upon which the cases of the second class are grounded, viz., that the implied promise on the part of the depository to pay the depositor's checks is a promise for the benefit of third parties, the check-holders, and may be enforced by them against the depository. That there is an implied promise on the part of the depository to the depositor to repay the amount deposited, upon the checks of the depositor, is the doctrine of all the cases and law-writers. This implied promise arises wholly from the custom of bankers in the transaction of business with depositors. *Morse Banking*, 35; *Dutton v. Phoenix Bank*, 6 Will. 297; *Margelle v. Williams*, 1 Barn. & Ad. 415. Under this custom the banker impliedly agrees to waive his right to insist upon repayment in one lump, and to pay

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in such sums as the depositor may order by his checks. This promise is made with the depositor, for his convenience, and we think cannot be said to be made for the benefit of third parties, who may become the holders of the depositor's checks. And much less can it be said that the "promise is to the whole world." Neither can it be said, as we think, that under the custom of bankers, they receive the deposits with the understanding or thought that they assume any obligation or responsibility to the holders of the checks. It is clearly not the intention of bankers, when receiving deposits, that they may be sued by such individual checks-holders upon a refusal to pay.

As said by this court in the case of *Nat'l Bank of Rockville v. Second Nat'l Bank of Lafayette*, *supra*: "There is no implied contract in favor of the payee, against the drawee, that he will either accept or pay the check." To hold otherwise would be to overthrow the ninth and tenth reasons upon which the first class of cases are grounded, which reasons are reasonable and supported by the great weight of authority. As there stated the depositary banks are not bound to settle conflicting claims of check-holders, nor could they transact their business if compelled to do so. It can hardly be supposed that the banks would establish a custom, to ripen into an implied contract, by which they would be thus subjected to annoyance, delay and uncertainty in the transaction of their business which must be done with the utmost dispatch. And then too, if with the deposit there is an implied promise for the benefit of check-holders that may be enforced by them, it would result that after a check is presented, the holder is brought into privity with the bank, and the payment of the check cannot be countermanded by the drawer. And so the courts have been compelled to hold, which have asserted the doctrine of the second class of cases. Such a holding however is opposed to the common understanding and to the general weight of authority. All of the cases of the first class, where the question is mentioned, assert the doctrine that at any time before payment, or before the bank has in some way committed itself to pay, the check may be countermanded by the drawer.

Mr. Morse, citing numerous cases in his support, says: "A check is simply a written order of a depositor to the bank to make a certain payment. It is executory, and as such it is of course revocable at any time before the bank has paid, or committed itself to pay it. * * *

"The remark once fell from Judge STORY, in the oft cited '*Matter of Brown*,' that the drawer of a check had no right to countermand payment at the bank. It was obvious from the context that the judge referred rather to moral right than to legal right. He meant simply that a debtor who had given to his creditor a check in payment of the debt had no right as toward that creditor, 'right' being considered as a matter of honesty, to order non-payment of the check. The language of the judge, taken in isolation from the circumstances of the case, and from the remainder of the opinion, seems to admit a different meaning, and is therefore capable of a misinterpretation and misuse, which have sometimes been feebly attempted. But if such a misunderstanding is possible, still the authorities to the contrary effect are numerous and leave no shadow of doubt upon the point.

"The bank is the drawer's agent. Its primary duty is to hold or to pay his money as he directs. Primarily it owes no duty to the holder, except under and by virtue of directions from the drawer. Until by reason of these directions it has assumed voluntarily, or by action of law has involuntarily come under secondary and superseding obligations to the holder, the latest orders from the drawer govern its right to act on his behalf." *Morse Banking*, 302-3, and cases there cited. So also, *Griffin v. Kemp, supra*; *Story Prom. Notes*, § 498, and cases cited.

This power on the part of the depositor to countermand the payment of checks is a part of the implied contract between him and the depository when the deposit is made, as much as the implied agreement on the part of the depository to pay his checks. We conclude therefore that the check-holder cannot recover of the drawee on its implied promise to the depositor.

Another reason upon which some of the cases of the second class are founded is, that the check operates as an appropriation, *pro tanto*, of the fund in the hands of the drawee. This does not commend itself to our judgment. That the depository is a bailee or trustee of any fund, is not supported by reason or authority. Strictly speaking the depository holds no fund to be appropriated. It owes a debt. The right of the depositor is a chose in action. This or a part of it may be assigned. When assigned, equity, for the purpose of making good the assignment, seizes upon the debt and calls it a fund. An ordinary check however without words of transfer, and drawn upon no particular fund, does not effect such

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an assignment. In some of the cases it is said that by an acceptance of the check an equitable assignment is effected; but this is not strictly correct, because by accepting the check, the depository assumes an independent and unconditional liability to the holder. *Morse Banking*, 307, 313, and cases there cited.

The eleventh and last reason upon which the first class of cases is grounded, as given above, is that in the absence of evidence, except what the check furnishes, it must be presumed that the payee takes the check upon the credit of the drawer. Many of the cases assert this, and it seems to us reasonable. It may be said that the payee relies upon the honesty of the drawer, in either an express or implied representation that the drawee is indebted to him. Doubtless the payee of the check relies upon the financial ability of the drawer to make good his express or implied promise to refund to him the amount of the check, should payment be refused by the drawee. It could hardly be said that the payee of each check takes it with the idea of suing the drawee. Especially could this not be said where the drawer and payee are residents in one State, and the drawee in a distant State. That the part of a fund or chose in action may be assigned, we have already seen; and where there is an intention of the drawer and payee that a fund or chose in action, or a part of either, shall be assigned, the assignment may be effected by an order bill or check. In such case the intention controls, and will be given effect by the courts. It is upon this principle that an order upon the whole of a special fund operates as an assignment. See *Pomeroy Eq.*, § 1280, *et seq.*, and cases there cited; *Bispham Prin. of Eq.* 219, 220, and cases there cited.

Says Mr. Pomeroy: "What shall amount to the present appropriation which constitutes an equitable assignment, is a question of intention to be gathered from all the language construed in the light of the surrounding circumstances." *Pomeroy Eq.*, § 1282. So it is said by the same author, in the latter portion of section 1284 of the same work: "A check may undoubtedly operate in this manner as an equitable assignment when it is so drawn as to show an unmistakable intention of the drawer to transfer his exact deposit in the bank to the payee." See also *Kingman v. Perkins*, 105 Mass. 111; *Macomber v. Doane*, 2 Allen, 541. In the case of *Kahnweiler v. Anderson*, 78 N. C. 133, it was said that the intention to assign, founded upon a consideration, and expressed by a bill or draft, operates as an equitable assignment. In the case of *Bank of*

Commerce v. Bogy, supra, it was said that the drawing of a bill of exchange does not of itself operate as an equitable assignment of the debt, but is evidence tending to show such an assignment; that any thing that shows an intention on the one side to make an irrevocable transfer of the debt or fund, and from which an assent to receive it may be inferred, will operate in equity as an assignment. To the same point see *Kimball v. Donald, supra*; *First Nat. Bk., etc., v. Dubuque Ry. Co., supra*. This same doctrine is asserted in many of the cases above cited. In speaking of orders that will, or will not, of themselves operate as an assignment, Mr. Pomeroy gives a very safe criterion. He says: "The sure criterion is, whether the order or direction to the drawee, if assented to by him, would create an absolute personal indebtedness payable by him at all events, or whether it creates an obligation only to make payment out of a particular designated fund." § 1280.

The acceptance of orders upon a particular designated fund, which are held as assignments, binds the acceptor only to the extent of the fund drawn upon. The acceptance of a check creates an independent, unconditional obligation on the part of the acceptor whether he holds funds of, or is indebted to, the drawer or not.

Our conclusion is, that a check in the ordinary form upon the drawer's banker, without words of transfer, and drawn upon no particular, designated fund does not of itself operate as an appropriation or equitable assignment of a fund in the hands of the drawee, nor does it operate as an assignment of a part of the drawer's chose in action against the drawee.

Keeping in view our statutes, and the equitable rules already stated, we base this holding upon the considerations:

First. There is no implied contract on the part of the depository of which the check-holder can take advantage as against the depository.

Second. In the absence of evidence to the contrary, or a showing of an intention to assign a part of a fund in the hands of the drawee, or a part of the drawer's chose in action against the drawee, it should be presumed that the payee or holder of a check takes it upon the credit of the drawer, of whom he may collect, if payment be refused by the drawee.

Third. To hold the contrary, would be to disregard the implied and well understood right of the drawer to countermand the payment of checks.

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Fourth. It would greatly embarrass banks in the transaction of their business to hold that they are liable to each check-holder, and hence must, at their peril, settle conflicting claims of check-holders.

In the case before us, the checks contain no terms of transfer; they are not drawn upon any particular designated fund, nor is there any thing in them, or the circumstances connected with the giving of any of them, that indicates any intention on the part of the drawers or payees, that there should be an assignment of any thing. We hold therefore that as between the payees or holders of the checks and the drawees, there was no appropriation or assignment of any fund, nor of any part of the drawer's chose in action against the drawees. It would seem to follow logically, that as there is no assignment as between the payee and drawee, there is none as between the drawer and payee. And so the cases of the first class hold.

This brings us to the third class of cases as we have grouped them, and to a consideration of the question as to whether or not, notwithstanding our conclusions thus far, the giving and receiving of the checks operated as an equitable assignment as between the payees and drawer, or in other words, entitle the payees and holders to a preference over the depositors and other general creditors of the Indiana Banking Company.

THIRD CLASS OF CASES.

In an action to have a check paid in full from the estate of a bankrupt drawer, it was held, *Matter of Brown*, 2 Story C. C. 502, that the holder was entitled to this, on the ground that a check is an instrument *sui generis*, and is to be construed exactly as the parties intend it; that the check, of itself, is an appropriation of the fund in the hands of the drawee, and that consequently the drawer has no right to withdraw the funds after giving the check.

The case of *First Nat. Bank of Cincinnati v. Coates*, 3 McCrary, 9, grew out of the failure of the Mastin Bank, at Kansas City, as did the cases in 17 Blatchf., 79 Mo. and 91 N. Y., *supra*. The bank made an assignment to Coates, after having issued and delivered a "draft" upon its depositary in New York. Before the "draft" was presented for payment Coates withdrew the deposit from the New York bank. As between the assignee and payee, Mr. Justice MILLER held that the "draft" was in law and fact a

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check, and that while a deposit of money in a bank creates a debt on the part of the bank, it is a fund deposited to the credit of the depositor, and that the check operated as an appropriation or equitable assignment, *pro tanto*, of the fund to the holder, and that thus far the fund did not pass to the assignee. It seems to have been contended that there was no assignment by the check; that for want of privity, and because the check was for but a part of the fund drawn upon, and because the depository could not be called upon to pay out the deposit except in a single payment, the payee of the check could not maintain an action against the drawee, and was therefore not entitled to a preference as against other creditors of the drawer. All this the justice answered by saying that such is the rule at law, but not in equity. Upon substantially a similar state of facts, except that the check was for a collection made by the drawer, a like ruling was made in the case of *German Savings Institution v. Adee*, 1 McCrary, 501. Stress was laid upon the fact that the check was for a collection.

The facts in the case of *Gardner v. Nat'l City Bank*, 39 Ohio St. 600, were, that a party wishing money procured it by giving his check to a bank in Ohio upon a bank in Philadelphia for the full amount of his deposit in the latter bank. Before the check was presented, the Philadelphia bank remitted to the drawer by a certified check. He deposited this in another bank in Ohio as cash, and it was afterward paid. After making subsequent deposits in this bank, and checking out various sums from time to time, the drawer made an assignment for the benefit of creditors. The assignee and all interested parties were brought before the court by an application on part of the payee of the check to have it paid in full. The court distinguished the case from one between the payee and drawee, or where the check is for less than the whole fund drawn upon, and held, that as between the drawer and payee, it was the manifest intention of the parties to transfer the absolute right to receive the amount from the drawee, and that the draft should operate as an equitable assignment of the funds in the hands of the drawee; that it did operate as such assignment, and that when the drawer received the amount from the drawee, it in equity belonged to the payee.

Mr. Daniel (2 Dan. Neg. Inst., § 1638), after argument in favor of the doctrine of the cases of the second class above, states that there can be no doubt, that as between the drawer and payee, the check operates as an equitable assignment, and bases his statement

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upon the cases of the third class alone, and the case of *Bell v. Alexander*, 21 Grat. 1; *Morrison v. Bailey*, 5 Ohio St. 13; *Robinson v. Hawksford*, 9 Q. B. 51; *Keene v. Beard*, 8 C. B. N. S. 373, and the case of *Bank of Republic v. Millard*, *supra*. We are unable to understand in what way the case in Wallace, or the English cases, lend any aid to the position of the author. The cases cited from 5 Ohio St. and 21 Gratt. did not involve the question necessarily, as they were actions upon the check by the holder against the drawer, the check not having been paid by the payee.

As will be observed, the case in 2 Story, *supra*, is based upon the broad statement that a check is an appropriation of so much of the fund in the hands of the drawee, so that the drawer cannot withdraw it after giving the check. This case is in conflict with all the cases of the first class above, has been many times criticised and condemned, and we think properly so.

The case in 39 Ohio St. is based upon the theory, that from the fact that the check was for the whole of the drawer's deposit in the Philadelphia bank, and the other circumstances of the transaction, it plainly appeared, that as between the drawer and payee, the intention was to transfer the ownership of that deposit to the payee.

It is not improper to remark that the opinion in the case in 3 McCrary, *supra*, was delivered orally. If the sweeping statements there made as to the assignment by a check should be carried out to their full extent, they would result in a holding that in equity a check works such an assignment as between the payee and drawee also. Such a holding, as we have seen, would be in conflict with the great weight of authority. The same may be said of the case in 1 McCrary, *supra*.

Possibly, cases may arise where as between the drawer and payee or holder of a check, a court of equity may interfere and protect the check-holder, not because the check of itself works an assignment of any fund or of any part of the drawer's chose in action against the drawee, but rather upon the equitable doctrine of money had and received.

By giving a check, the drawer impliedly says to the payee that he may collect so much from the drawee, if he will pay it. And while the depositary does not hold the money as the agent of the depositor, it may be said that as to when, to whom, and in what amounts, the amount deposited shall be paid out, the depositary acts as the agent of the depositor, subject to his orders.

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A check may be given, and before payment the money withdrawn from the depository by the drawer under such circumstances that it would be inequitable and a fraud to allow the drawer to retain the amount received for the check and also the amount withdrawn from the depository. For example, if A. having no property except a deposit, should receive B.'s money for a check upon the depository, and after giving the check should withdraw the deposit; as an action upon the check would be fruitless, it might be that B. could in equity follow the money withdrawn by A. and recover it as for money had and received, if this would not interfere with the rights of other equally worthy creditors. This however is not the case before us.

One or two of the checks in the case before us were given for collections made by the banking company. It may be that if the payees had declined to accept the checks, they might have insisted that the amounts thus collected were held in trust, and should therefore be paid in full. This they did not do, but accepted the checks and still retain them. We think that it should be held, as was held in one of the New York cases, that by accepting the checks instead of the cash, the payees gave credit to and relied upon the Indiana Banking Company, and thus placed themselves upon an equality with the other check-holders.

Some of the checks were purchased with cash by persons who were not depositors with the bank; others by depositors giving their checks. The court below held that the checks purchased with cash should for that reason be paid in full, and that the other checks should share *pro rata* with the other debts. We can see no substantial reason for such a preference. If the depositors had withdrawn the amount from the bank, and with this purchased the checks, it might well be said that they purchased them with cash. Whether the checks were paid for in cash or by the checks, the bank in each case received the amount of them.

The transaction between Murphy, Hibben & Co., and the Indiana Banking Company, in the delivery and acceptance of the checks, was attended with some circumstances peculiar to that transaction, but they are not such, we think, as to rebut the presumption that the checks were received upon the credit of the Banking Company, or to show that the parties intended that the checks should operate as an assignment of any fund or chose in action. And so with all of the checks, there is nothing to show that there was any intention

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by the parties that they should operate as an assignment of any fund or chose in action. There is nothing to overthrow the presumption that they were accepted upon the credit of the Indiana Banking Company.

The checks were dishonored. Because of that dishonor the holders have a right of action against the Indiana Banking Company. That right, like the right of action in favor of the depositors and other creditors, is a legal right. The affairs of the bank are in the hands of a receiver, but this does not change the nature of these rights. *Grammel v. Carmer, supra.*

There is nothing in the case to create a superior equity in favor of the check-holders as against the depositors and other creditors. No fraud is charged or shown whereby the payees were induced to part with their money for the checks. They were purchased in the usual course of business. The assets of the bank will not pay its debts in full. The depositors deposited their money, relying upon the credit of the bank, that the amounts would be repaid to them when called for. The payees purchased the checks, relying upon the credit of the bank, that the amounts paid for them would be refunded, if for any cause the checks should not be paid by the drawees. It is a case where equality among the creditors is equity.

So far as it was adjudged below that the check-holders are not entitled to preference the judgment is affirmed; so far as it was adjudged that any check shall be preferred and paid in full as against the other creditors of the Indiana Banking Company, the judgment is reversed with instructions to the court below to proceed in accordance with this opinion. It is further ordered that the court below direct the receiver to pay the costs of this litigation thus far out of the funds in his hands.

Ordered accordingly.

ELLIOTT, J., did not participate in the decision of this cause.

BAUMGARTNER V. HASTY.

(100 Ind. 575.)

Municipal corporation — nuisance — fire — tearing down wooden building.

A city may summarily tear down a wooden structure, erected within designated fire limits, and dangerous on account of fires.

ACTION for destroying a wooden structure. The opinion states the case. The plaintiff had judgment below.

B. F. Ibach and L. P. Boyle, for appellant.

J. B. Kenner and J. I. Dille, for appellee.

ELLIOTT, J. The controlling question in this case arises upon the ruling on the demurrer to the appellant's answer. The appellee's complaint charges that the appellant wrongfully and maliciously destroyed a covering erected over an ice box on the premises of the appellee. The appellant answered by way of justification, alleging that he was the marshal of the city of Huntington; that the appellee was the owner of a lot in that city; that the lot was situated in a part of the city in which the common council had by ordinances prohibited the erection of wooden buildings; that the appellee, in violation of the provisions of the ordinances, did erect a frame building on the lot; that he was requested to remove the building, and refused to do so, whereupon the appellant notified the mayor, in accordance with the provisions of the ordinance, and that officer issued to him a warrant, commanding him to remove the building, and acting under this warrant, he did remove it, using all proper care and doing no unnecessary damage. It is also alleged that the appellant acted without malice in removing the building; that the removal was necessary, because the building was erected in such close proximity to other buildings as to greatly endanger their safety, and that the danger so created was an imminent one.

Two ordinances of the city, duly enacted and published, are set forth. These ordinances contain provisions making it unlawful to erect wooden buildings within the prescribed limits, imposing upon the marshal the duty of notifying the mayor of a violation of the ordinance, and providing that the mayor, upon the report of the marshal, shall issue his warrant to take down and remove the building.

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A wooden building is not in itself a nuisance, but when erected in a place prohibited by law, and where it endangers the safety of adjoining property, it may become a nuisance. If the locality and character of such a building do endanger the safety of surrounding buildings, then it may be treated as a nuisance, and a governmental body, having authority to legislate upon such subjects, may prohibit its erection in places where it would endanger the safety of surrounding property. There are many things that are not nuisances *per se*, but which become such when placed in locations forbidden by law, and where they essentially interfere with the enjoyment of life or property. In a work of excellent standing it is said: "While a man has a right to follow his own tastes and inclinations as to the style and character of the building that he will erect upon his own land, yet he has no right to erect or maintain there a building that is dangerous, by reason of the material used in, or the manner of its construction, or that is inherently weak or in a ruinous condition and liable to fall and do injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it." Wood Nuis., § 109. It must rest with the governmental authorities of the locality to determine in what places wooden buildings shall not be erected, for courts cannot exercise legislative functions in such matters. For the courts to undertake to prescribe in what localities in towns and cities wooden buildings shall be erected, would be to usurp governmental powers which are delegated to the local authorities. It would be to take upon themselves the government of municipal corporations, and this no one will assert they have any right to do. Where therefore a valid municipal ordinance prohibits the location of wooden buildings within certain limits, and it appears, as it does here, that the building is located within the prohibited district and endangers the safety of surrounding property, it may properly be treated as a public nuisance and as such abated. We are not unmindful of the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one; but while we recognize this rule, we also recognize the equally well settled rule that it has the power to treat as a nuisance a thing that from its character, location and surroundings, may and does become such. In discussing this general subject it was said, in a recent case: "But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judg-

ment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question." *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 207; s. c., 44 Am. Rep. 788. The chancellor, in the course of a discussion of the question in the famous case of *Hart v. Mayor, etc.*, 3 Paige, 213, said: "It therefore becomes necessary, in all populous towns and crowded harbors, to regulate such matters by police ordinances. And public policy requires that the corporation of the place, or conservators of the port, should not be disturbed in the exercise of those powers, unless they have clearly transcended their authority." Speaking upon the same subject, another court has said: "The proper exercise of the police power and the efficient preservation of the public health could hardly be accomplished, if every individual or any set of individuals can determine what is properly to be regarded as a nuisance and what are measures of salubrity. The various tastes and habits and the conflicting hygienic theories of different persons would, if it were necessary to be guided by them, prevent the municipal authorities from adopting any fixed and certain plan. It is therefore right and proper that they should be vested with the authority to decide what comes within the 'legal notion' in that regard." *Mayor, etc., v. Gerspach*, 33 La. Ann. 1011. But we have not time to make further extracts from the adjudged cases, but content ourselves with referring to some of the many cases in which similar declarations are made. *Baker v. City of Boston*, 13 Pick. 184; *First Municipality v. Blinneau*, 3 La. Ann. 689; *Kennedy v. Phelps*, 10 La. Ann. 227; *Mayor, etc. v. Hoffman*, 29 La. Ann. 651; s. c., 29 Am. Rep. 345.

Our statute grants very comprehensive powers to municipal corporations respecting the abatement of nuisances, and if a wooden structure, erected in a place where it endangers surrounding property, can be regarded as a nuisance, there can be no question as to the right of the municipal corporation to cause its removal. But it is settled without dissent, that without a special grant of authority public corporations may, as a common-law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. The authorities do indeed go much further, for they declare that it is the duty of the corporation to abate public nuisances. It is one of the oldest of the

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common-law rules, that an individual citizen may without notice abate a nuisance, and if it is necessary to effectually abate it, destroy the thing which creates it. Of the authorities sustaining this doctrine we cite only a few: *Lodie v. Arnold*, 2 Salk. 458; *Hart v. Mayor, etc.*, 9 Wend. 671; s. c., 24 Am. Dec. 165; *Viner Abridg. Tit. Nuisance*; 1 Hawk. P. C., chap. 32, § 12; 3 Bl. Com. 5; *Broom. Com.* 222; *Cooley Torts*, 46; *Northrop v. Burrows*, 10 Abb. Pr. 365; *Jones v. Williams*, 11 M. & W., 176; *Lansear v. Mayor, etc.*, 4 La. 97; s. c., 23 Am. Dec. 477; *Harvey v. De Woody* 18 Ark. 252; *Ferguson v. City of Selma*, 43 Ala. 398; *People v Vanderbilt*, 28 N. Y. 396; *State v. Flannagan*, 67 Ind. 140; *City of Indianapolis v. Miller*, 27 Ind. 394; *Grove v. City of Fort Wayne*, 45 Ind. 429; s. c., 15 Am. Rep. 262.

These authorities, running back as they do into the early years of the common law, and extending in an unbroken line to the present time prove that not only may a governmental corporation abate a nuisance by the destruction of the thing constituting it but so also may a private individual. It is therefore not the delegation of a new or an extraordinary power to authorize municipal corporations to abate nuisances by removing or destroying the thing which creates it. A man has no right to build a wooden house in a place prohibited by law, and thus endanger the safety of the person or property of others. He has neither a legal nor a moral right to do an illegal act on his own premises, which puts in jeopardy the person or property of another. There can be no acquisition of a right by the performance of an illegal act. In removing a building erected in violation of law, and in a situation where it imperils person or property, no private right is invaded, because none could grow out of the illegal act.

There is some conflict in the authorities as to whether a municipal corporation possesses the inherent power to prohibit the erection of wooden buildings within prescribed limits and to cause their removal. Judge Dillon's opinion is that the power does inhere in all municipal corporations, for we find him writing that cities may, "where this is consistent with the general and special legislation applicable to the municipality, establish fire limits and prevent the erection therein of wooden buildings." 1 Dill. Mun. Corp. (3d ed.), § 405. The Supreme Court of Michigan, in speaking of ordinances similar to those here under examination, said: "Of the power of the common council to pass the ordinances in question, we have no

doubt. They contravene no provision of the Constitution as we read it, and they were made in the exercise of a police power necessary to the safety of the city." *Brady v. Northwestern Ins. Co.*, 11 Mich. 425. There are other cases sustaining this view. *Wadleigh v. Gilman*, 12 Me. 403; *Mayor, etc., v. Hoffman*, 29 La. Ann. 651. These cases rest on solid principle, for the rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire. 2 Bacon Abridg. 147; *Clark v. City of South Bend*, 85 Ind. 276; s. c., 44 Am. Rep. 13; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, see p. 669; 2 Kent. Com. 339. The exercise of such a power is not the exercise of a new power, nor of one not connected with the purposes for which public corporations are organized; on the contrary it is the exercise of a power long possessed by municipal corporations and closely connected with the purposes for which such corporations are organized. In speaking of ordinances much the same as those here under discussion, it was said in *Mayor, etc., v. Hoffman supra*: "No town or city compactly built can be said to be well ordered or well regulated which neglects precautions of this sort. It is its duty to the public to take such measures as may be practicable to lessen the hazard and danger of fire." A legislative act granting authority to take precautions against fire, and ordinances passed under such an act authorizing the removal of wooden structures erected within forbidden limits, are little more than express declarations of the existence of powers which existed at common law and are necessarily implied in the grant of a charter to a city.

There are very many provisions in the general act for the incorporation of cities conferring authority upon the common council of cities to enact ordinances to secure protection against fire, and these provisions taken, as they must be, as parts of one uniform system, leave no doubt in our minds that the legislature meant to invest cities with authority to enact such ordinances as were reasonably necessary to prevent the destruction of property by fire. In the enumeration of the powers of the common council, there is an express grant of power, and when this provision is read in connection with the other provisions of the act, it is very clear that the whole power of enacting ordinances upon the subject is vested in the common council. It is quite certain that the common council is the only branch of municipal government invested with legisla-

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tive functions, and it would be unreasonable to hold that any other than the legislative body could enact ordinances.

There is little if any conflict in the decisions upon the question of the validity of ordinances passed under express legislative authority fixing limits within which wooden buildings shall not be erected; the conflict among the cases is upon the question whether the municipal corporation possesses the power to enact such ordinances without express legislative authority. Even in Pennsylvania, where a narrow view is taken of the general subject, such ordinances have been sustained, and in a recent case it was said: "It is true that a wooden building, though erected contrary to law, is not *per se* a public nuisance. But it may become such by the manner in which it is used or allowed to be used." At another place, in the same opinion, it was said, in speaking of the buildings of the plaintiff: "The city of Philadelphia was the owner of large and valuable property in their neighborhood. Any hour of the day or night they were in danger of being set on fire by those who frequented them with the owner's permission. It is stated as a fact in the special plea, and of course a fact admitted by the agreement, that the public safety was imperiled. Nothing more was necessary to justify the action of the defendant." *Fields v. Stokley*, 99 Penn. St. 306; s. c., 44 Am. Rep. 109.

In the case before us the answer avers, and the demurrer admits, that the location of the appellee's building was such as to put surrounding property in imminent danger, so that the case falls fully within even the narrow rule of the Pennsylvania court. In the early case of *Respublica v. Duquet*, 2 Yeates, 493, the legislature authorized the municipal corporation to prevent the erection of wooden buildings, and an ordinance enacted pursuant to this law was held valid. The subject received very full consideration in *King v. Davenport*, 98 Ill. 305; s. c., 33 Am. Rep. 89, and it was held that an ordinance providing for the summary destruction of a wooden building erected within forbidden territory was valid. In the course of the opinion it was said: "There can be no doubt, it seems to us that the ordinance in question was a police regulation, proper, and made in good faith, 'for the purpose of guarding against the calamities of fire' in a populous neighborhood; and we must regard it as an entirely reasonable regulation. There is no more frequent or admittedly proper exercise of the police power, than that of the prohibition of the erection of buildings of combustible materials in the populous part

of a town, and the only means of making such prohibition effectual is by a summary abatement. Every moment's delay in the removal of the nuisance is constant exposure to danger. Before any judicial hearing could be had in the matter, the whole evil sought to be guarded against might be produced." It was also held in that case, that the erection of a wooden building in a forbidden place created a nuisance, which might be summarily abated. the court saying: "But what is a nuisance at common law? Blackstone's definition is, whatsoever unlawfully annoys or doth damage to another, is a nuisance."

We cannot take time to quote further from the adjudged cases upon this phase of the case, but content ourselves with referring to the reasoning in the cases already referred to upon another feature of the case, and the cases of *Corporation of Knoxville v. Bird*, 12 Lea, 121; *City of Salem v. Maynes*, 123 Mass. 372; *Field v. City of Des Moines*, 39 Iowa, 575; s. c., 18 Am. Rep. 46.

The case principally relied upon by the appellee is that of *Kneeller v. Burrough of Norristown*, 100 Penn. St. 368; s. c., 45 Am. Rep. 363. That case concedes that where the legislature authorizes the municipal corporation to enact ordinances such as those under examination, they are valid; so that conceding it to be well decided, it does not sustain the judgment below.

The removal of a building, erected in defiance of law in a place where it endangers surrounding buildings, is not the forfeiture of property; it is the exercise of a police power, and is not a declaration of forfeiture. The removal of the building, or its demolition, may cause loss to the owner, but there is no forfeiture of it to the public, or to any one else. We have seen that the rule has been for hundreds of years, that property may be destroyed if it creates a public nuisance in cases where the nuisance cannot be effectually abated in any other way. A striking illustration of this general doctrine is found in the case of *Mocker v. Van Rensselaer*, 15 Wend. 397, where it was held lawful for an officer acting under a board of health to tear down a tenement house cut up into small apartments, and calculated to breed disease. There are cases by the scores in the books affirming the general doctrine, and we suppose that until the decision in *Kneeller v. Burrough of Norristown*, *supra*, no one thought of treating the destruction of property constituting a nuisance as a forfeiture. Certainly, individuals have no right to pronounce forfeitures, and yet they may destroy property when neces-

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sary for the abatement of a public nuisance. It is inconceivable therefore that the act of removing or destroying a building to prevent the hazard of fire can be regarded as constituting a forfeiture. The real ground upon which the right rests is that stated in *Field v. City of Des Moines, supra*, where MILLER, C. J., in delivering the opinion of the court, said: "That any person may 'raze houses to the ground to prevent the spreading of a conflagration,' without incurring any liability to the owner of the houses destroyed, is a doctrine well established in the common law. The maxim of the law is that 'a private mischief is to be endured rather than a public inconvenience.'" 2 Kent Com. 338. Lord COKE says: "For the Commonwealth a man shall suffer damage; as to the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do without being liable to an action." The general principle which authorizes the destruction of buildings to stay the progress of a conflagration unquestionably authorizes the enactment of laws for the prevention of danger from fire. The question is much less doubtful in a case like this, where the building is constructed in defiance of law, than in a case where the building was lawfully erected, and its destruction made necessary by subsequent events. The general question here involved was discussed in the celebrated *Slaughter-House* cases, 16 Wall. 36, where many instructive cases are gathered together, and it needs no extended discussion from us. The point which is here the decisive one was admirably discussed by the court in *Vanderbill v. Adams*, 7 Cow. 349, and from that decision we take this forcible statement of the conclusion reached after a review of the cases: "The owner of a lot in a city intends to build of wood; the constituted authorities say: 'You must not exercise that right; it is dangerous to all. You may build of brick or stone; because the safety of all is, in this way, promoted.' Can the owner, with impunity, violate such a law, because he has the absolute right of property? It has not been heretofore so considered."

A municipal corporation is composed of the inhabitants of the territory over which its limits extend, and not of the officers. It is an instrumentality of local government, and every voter is a participant in the governmental affairs of the corporation. There, as elsewhere in free governments, the majority rule, and the officers elected are the representatives of the citizens, and their official acts are the expressions of the public will. *Strosser v. City of Fort Wayne*, 100 Ind. 443; *City of Valparaiso v. Gardner*, 97 Ind. 1; s. c., 49

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Am. Rep. 416; 1 Dill. Mun. Corp. (3d ed.), § 40. It is therefore the citizens themselves who fix the limits within which the erection of wooden buildings shall be prohibited, and if there is any fear of oppression, that fear must be that the people invested with the right of local government will oppress themselves for the power is in their own hands. But it is not oppressive for the majority of the corporators, acting through their representatives, to prescribe fire limits. The citizen who denies that right is the one who manifests a spirit of oppression, for he would, if he could, sacrifice the public safety to his selfish interests. It is more just and more expedient, that the will of the majority of the citizens, lawfully expressed, should govern, than that one man should rule because it promotes his private interest.

The constitutional provisions respecting the titles of acts of the general assembly, and like matters, do not apply to the by-laws of municipal corporations. *Green v. City of Indianapolis*, 25 Ind. 490.

The first ordinance defining the fire limits was passed on the 31st day of January, 1880, and by an ordinance adopted in March, 1881, it was ordained that in addition to the territory included within the fire limits prescribed by the former ordinance, it should be unlawful to erect a wooden building within the territory added to the limits by the last ordinance. In the later ordinance is the following provision: "And all the provisions of an ordinance passed on the 31st day of January, 1880, by the common council of the city of Huntington, and any provisions thereof, shall be extended over and apply to the territory included in this ordinance." We have no doubt as to the validity of both these ordinances, and that the clause of the last ordinance does bring the territory described in it within the provisions of the earlier. The effect of the language employed is to enact that the provisions of the earlier ordinance shall be extended to new territory. We have in our statutes scores of instances in which legislation of the same general character was adopted in substantially the same method. It has indeed been held in several cases that a statute may be carried forward by reference to the general subject. *Opp v. Ten Eyck*, 99 Ind. 345, and cases cited. If the legislature of a State were required to embody every act referred to in the act making the reference, it would soon be true that "of making many books there is no end."

Judgment reversed, with instructions to overrule the demurrer to the answer, and to proceed in accordance with this opinion.

Judgment reversed.

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ACTION.

On check.] *See* NEGOTIABLE INSTRUMENT, 417.

For salary.] *See* OFFICE AND OFFICER, 421.

See BANK, 805 ; JURISDICTION, 730 ; STATUTE, 688 ; TRESPASS, 699.

ADOPTION.

Descent.] Where a child, adopted by a husband and wife jointly, dies without child or descendant, owning lands inherited from the adopted mother, the surviving adopted father inherits them to the exclusion of the natural mother. *Humphries v. Davis* (100 Ind. 274), 788.

ADVERSE POSSESSION.

Of husband under wife's irregular will — tacking.] A wife devised a farm to her husband for his life, with remainder in fee to her nephew. The will was admitted to probate, but was not executed in compliance with the statutory requirements. The husband entered into possession under claim of title, and continued in possession for thirteen years, and then joined the nephew in a sale of the farm, and the purchaser entered and held possession for fourteen years. Then in ejectment by the heirs-at-law of the testatrix against the purchaser, *held*, that the husband's possession was adverse and exclusive, and the purchaser's possession was tacked thereto, and both constituted an effectual adverse possession. *Hanson v. Johnson* (62 Md. 25), 199.

AGENCY.

- 1. To manage hotel — livery stable.]** An agent to manage a hotel has no implied power to bind his principal for the safe keeping and return of carriages furnished by a livery-stable keeper for guests of the hotel. *Brickway v. Mullin* (46 N. J. Law, 448), 442.
- 2. Vested interest — termination.]** A general agent for an insurance company, discharged for failure to account according to his contract, has no interest in premiums thereafter to be collected on policies issued through his agency. *Phenix Mut. Life Ins. Co. v. Holloway* (51 Conn. 811), 20.

See CRIMINAL LAW, 270 ; NEGOTIABLE INSTRUMENT, 508.

ANIMALS.

Servant's knowledge of viciousness.] A servant's knowledge of the vicious character of a dog accustomed to follow him about in the master's business, but not put in his charge by the master, is not imputable to the master. *Twigy v. Ryland* (62 Md. 390), 226.

See CONVERSION, 345.

ARBITRATOR.

Attorney — liability for conspiracy.] An arbitrator is not liable to an action by one party for fraudulently conspiring with the attorney of the other party to induce the other arbitrators to join him in an unjust award, but the attorney is liable, although the judgment on the award remains unreversed. *Hoosac Tunnel Dock and Elevator Company v. O'Brien* (183 Mass. 494), 333.

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Disbarring — indictable offense.] An attorney may be disbarred even for an indictable offense and before prosecution. *State v. Winton* (11 Oreg. 456), 486.

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BANK.

Banker's check — equitable assignment.] A bank cashier's check, drawn on a bank in another State, on no particular fund, is not a bill of exchange, and does not operate as an assignment of the fund, and the holder is not entitled to preference over depositors and general creditors of the insolvent drawee. *Harrison v. Wright* (100 Ind. 515), 805.

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BAWDY HOUSE.

See CRIMINAL LAW, 204.

BILL OF LADING.

See CARRIER, 282.

BOARD OF HEALTH.

Statute — nuisance.] A board of health was empowered to take measures to preserve the public health and prevent malignant diseases, and to examine into nuisances and sources of filth which in their judgment would endanger health. They removed brush with oysters growing on it in a public river. *Held*, (1) that the members of the board were not liable for error of judgment in assuming it to be the source of disease; (2) that they might remove it although it was not filth; (3) that the removal was lawful although not made until after the disease had ceased; (4) and that it made no difference that the board causing the removal was composed of different members from the board ordering it. *Raymond v. Fish* (51 Conn. 90), 3.

See MUNICIPAL CORPORATION, 384.

BOUNDARY.

1. **Width of bay — reach of eye.]** In determining whether a bay or harbor is not wider than the reach of the eye, it is not necessary that a person on one side should be able to discern upon the other the ordinary movements of men with sufficient minuteness and certainty to testify to them in a court of justice; but it is sufficient if the ordinary eye can, in ordinary weather, discern the human figure, see that it moves, and distinguish between walking and running. *Rowe v. Smith* (51 Conn. 266), 16.
2. **"Middle of channel."] The "middle of the channel" means the space within which vessels usually pass. Id.**

CARRIER.

1. **Contract — negligence.]** The plaintiff, desiring to have his horse transported by defendant railroad, induced A., who had several horses to go by the same train, to include his and have it billed as A's. It was the defendant's rule that only one person could go free with stock, and when A. told the conductor there might be another person to accompany him, he replied that he would have to pay fare. The defendant had no knowledge of the plaintiff's intention to go on the train. The plaintiff got no ticket, but intended to pay his fare on the train. Before he could pay there was a collision by the defendant's negligence, and he was injured. *Held*, that he could not recover. *Gardner v. New Haven and Northampton Co.* (51 Conn. 148), 12.
2. **Ejection of passengers — offer of customary fare.]** A passenger on a railway train gave to the conductor the fare which he had been accustomed to pay, and the conductor demanded a further sum as due because the passenger had no ticket. This was refused, and the conductor stopped the train. Then the passenger tendered the additional sum, but the conductor refused it, and ejected him. *Held*, an unlawful ejection, unless the passenger's conduct was willful. *Texas and Pacific R. Co. v. Bond* (62 Tex. 442), 532.

CARRIER — *Continued.*

3. **Expulsion of passenger — negligence.]** A helpless, drunken passenger on a railway train refusing to pay fare, the conductor, knowing his condition, expelled him not at a station, and in the snow, by reason whereof the passenger was severely frozen. *Held*, that the company was liable. *Louisville, etc., R. Co. v. Sullivan* (81 Ky. 624), 186.
4. **Railroad company transporting cars of another railroad company.]** A railway company is bound to receive the freight cars of other railway companies for transportation, and is subject to the liability of a common carrier in respect to them. *Peoria, etc., R. Co. v. Chicago, etc., R. Co.* (109 Ill. 185), 605.
5. — **passenger on wrong train — ejection.]** The plaintiff at Jacksonville bought a ticket on the defendant's railway to Elkhart, and entered a train pointed out to him by the ticket-seller. The conductor accepted the ticket, but immediately notified him that the train did not stop at Elkhart, and that he could get off at Palestine and there resume his journey for Elkhart. He refused to get off and was ejected. *Held*, proper. *International G. N. R. Co. v. Hassell* (62 Tex. 256), 535.
6. — **ticket — expulsion.]** If the ticket-seller of a railroad company sells a punched ticket, assuring the purchaser that it is good, when in fact it is not, and the passenger is expelled for non-payment of fare, he may recover damages against the company. *Murdock v. Boston and Albany R. Co.* (187 Mass. 293), 307.
7. **Valuation in bill of lading.]** A shipper of goods for carriage is bound by an agreed valuation in the bill of lading and a stipulation that such valuation is to be the limit of recovery in case of loss. *Graves v. Lake Shore and Mich. So. R. Co.* (187 Mass. 83), 283.

See GARNISHMENT, 369 ; NEGLIGENCE, 550.

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Trust for.] *See* WILL, 29, 319.

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See BANK, 805; NEGOTIABLE INSTRUMENT, 417.

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See CRIMINAL LAW, 340.

CONFLICT OF LAWS.

See STATUTE, 683.

CONSIGNOR.

See STATUTE, 145.

CONSPIRACY.

See ARBITRATOR, 323.

CONSTITUTIONAL LAW.

1. **Altering salary of officer — police officers.**] Police officers of cities are not within the constitutional provision forbidding legislation to change the compensation of public officers while in office. *Mangam v. City of Brooklyn* (98 N. Y. 585), 705.
2. **"Banking corporation" — liability of stockholders.**] A constitutional provision that stockholders in bank corporations shall be liable for the corporate debts is applicable only to banks issuing bills of circulation. *Allen v. Clayton* (68 Iowa, 11), 716.
3. **Boom company.**] A company may be authorized to construct and maintain a boom on a navigable river and to collect and control all floating logs within certain limits, and to demand boomage on delivering them to their owners. *Osborne v. Knife Falls Boom Corporation* (32 Minn. 412), 590.
4. **Marriages between whites and negroes.**] A statute declaring marriages between white persons and negroes a felony is constitutional, and the enactment that the jury may determine the proportion of negro blood from the appearance of the person is not a violation of a constitutional provision that the legislature shall not pass any local or special law changing the rules of evidence. *State v. Jackson* (80 Mo. 175), 499.
5. **Militia — disbanding.**] The action of a division commander of State militia in disbanding a company for mutiny is cognizable only by the military authorities. *Grove v. Mott* (46 N. J. Law, 328), 424.
6. **Neglect to fence railways — attorneys' fees.**] A statute making railways liable for stock killed by reason of neglect to fence their tracks, and for attorneys' fees in addition, is not unconstitutional. *Peoria, etc., R. Co. v. Duggan* (109 Ill. 587), 619.
7. **Regulation of physicians.**] The State may authorize the State Medical Board to refuse a certificate, as a necessary condition to the right to practice medicine, for "unprofessional or dishonorable conduct," but the applicant has a right first to be heard, and is not entitled to *mandamus* to review the determination. *State v. State Medical Examining Board* (32 Minn. 324), 575.
8. **— of trade.**] A law requiring operators of butter and cheese factories on the co-operative plan to give bonds for faithful accounting for property received for manufacture is not unconstitutional. *Hawthorn v. People* (109 Ill. 802), 610.
9. **Restraint of trade.**] A statute making it a misdemeanor to manufacture cigars in cities of more than five hundred thousand inhabitants, in any tenement-house occupied by more than three families, except on the first floor of houses on which there is a store for the sale of cigars and tobacco, is unconstitutional. *In Matter of Jacobs* (98 N. Y. 98), 636.
10. **Crime near county boundary.**] A statute providing that offenses committed within one hundred rods of the dividing line between two counties may be prosecuted and punished in either, is not in violation of a constitutional provision securing to the accused the right to trial by a jury of the

CONSTITUTIONAL LAW — *Continued.*

"county or district" wherein the offense was committed, and which county or district shall have previously been ascertained by law. *State v. Stewart* (60 Wis. 587), 388.

CONTRACT.

1. **By letter — notice of acceptance.]** To constitute a valid contract by letter, if no time for acceptance of the offer is fixed, it must be affirmatively shown that the acceptance was mailed within a reasonable time and before any intimation of withdrawal was received. *Ferrier v. Storer* (63 Iowa, 484), 752.
2. **Implied — privity.]** Where a savings bank paid to a widow a deposit made by her husband in his own name, upon her claim that it was her property, the administrator of the husband cannot recover it from her. *Nolan v. Manton* (46 N. J. Law, 231), 403.
3. **In restraint of trade — "vicinity."]** An agreement by a physician not to practice in a certain city and "vicinity" excludes from territory within ten miles of the city. *Timmerman v. Dever* (52 Mich. 34), 240.
4. **Liability of voluntary association.]** The members of a voluntary association for educational purposes are personally liable for the wages of a teacher hired by the acting president of the association. *Hestk v. Gaska* (80 Mo. 310), 505.
5. **To build carriage like model — compliance.]** On a contract to build a carriage just like a model, substantial compliance is sufficient; unimportant differences will be disregarded. *Meincke v. Fulk* (61 Wis. 623), 157.
6. **Estoppel.]** The refusal of the buyer to accept the carriage solely on the ground that the contract was illegal, estops him from afterward raising the objection of non-compliance. *Id.*

Impairing.] *See* TAXATION, 463.

See MUNICIPAL CORPORATION, 739.

CONTRACTOR.

See MASTER AND SERVANT, 237.

CONTRIBUTION.

See SURETY, 495.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

Intent — driving away cattle.] If one drives the cattle of another upon a highway in a direction known to him to be opposite to the owner's residence, and they are lost in consequence, he is liable for conversion, although he did not intend it.

CONVERSION — *Continued*.

— *It seems*, that if one finds stray cattle on his land doing damage, in the afternoon, he may confine them over night, and turn them into the highway in the morning. By COLM, C. J. *Tobin v. Deal* (60 Wis. 87), 345.

See CRIMINAL LAW, 120.

CORPORATION.

1. **Gas company — duty to serve all.**] A gas company is bound to supply all individuals requiring it, on payment or reasonable security. *Williams v. Mutual Gas Co.* (52 Mich. 499), 266.

2. **Individual liability — "debt."**] The liability of a corporation for infringement of letters-patent, is not before judgment a "a debt" for which the officers are liable. *Child v. Boston and Fairhaven Iron Works* (187 Mass. 516), 828.

3. **Sole owner of stock — replevin.**] One who becomes the owner of all the capital stock of a private corporation, does not thereby become owner of its property, and cannot maintain replevin for it. *Button v. Hoffman* (61 Wis. 20), 181.

Liability of bank stockholders.] *See* CONSTITUTIONAL LAW, 916.

See FRAUD, 400; GARNISHMENT, 369.

CRIMINAL LAW.

1. **Agency.**] The owner of a saloon whose clerk, without his knowledge or consent, but while he was on the premises, opened it on Sunday morning to clean it, and sold a drink to a customer, may properly be convicted of keeping a saloon open on Sunday. *People v. Roby* (52 Mich. 577), 270.

2. **Assault — custom.**] On a trial for assault with a pistol, it is incompetent to prove a custom of the defendant and his associates, when controversies or disputes arose among them, to curse, abuse and denounce one another in obscene, insulting and violent language, and flourish knives and pistols, with threatening gestures, as a mere matter of jest and without any intention to use them to the injury of any one. *Hawkins v. State* (17 Tex. Ct. App. 593), 129.

3. **Bawdy-house — evidence of reputation.**] To prove the charge of keeping a bawdy-house evidence of the general reputation of the house is inadmissible. *Henson v. State* (62 Md. 231), 204.

4. **Evidence — declarations — res gestæ.**] Where one was robbed, his declarations of the circumstances very soon thereafter are competent evidence. *State v. Horan* (32 Minn. 394), 588.

5. **Former acquittal — jurisdiction.**] An acquittal in one county of the charge of receiving stolen goods is no bar to an indictment in another county for the same offense, unless it appears that the offense was committed in the former county. *Campbell v. People* (109 Ill. 565), 621.

6. **Indecent exposure.**] It is not essential to the crime of indecent exposure

CRIMINAL LAW — *Continued.*

that anybody should have seen the exposure, provided it were intentionally made, in a public place, and persons were present who could have seen if they had looked. *Van Houten v. State* (46 N. J. Law, 16), 397.

7. **Indictment — privately stealing from the person.]** Under a statute defining "privately stealing from the person" as "theft committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow them to make resistance before the property is carried away," an indictment simply charging stealing and carrying away privately from the person is bad. *Kerry v. State* (17 Tex. Ct. App. 178) 132.
8. **Jury — waiver of.]** In a criminal case the prisoner may not waive a jury. *State v. Curman* (63 Iowa, 180), 741.
9. **Larceny — conversion of hired horse.]** Where one hires a horse and subsequently converts it, an indictment for larceny will not lie unless it is shown that the felonious intent existed at the time of the hiring. *Morrison v. State* (17 Tex. Ct. App. 84), 120.
10. **— of money to be changed.]** The prosecutor handed the defendant a twenty-dollar bill to change, and he, pretending that he could not change it, fraudulently gave her a one-dollar bill instead of the twenty, and converted the twenty. *Held*, a larceny of twenty dollars. *Walters v. State* (17 Tex. Ct. App. 226), 128.
11. **Lottery.]** Where one chose a number and paid a certain sum, and the seller drew an envelope from a box full, containing a slip with many numbers on it, and if the number chosen was on the slip the buyer received a multiple of the sum paid, greater or less, according to the agreement, and if not he lost what he had paid; *held*, a lottery. *Commonwealth v. Wright* (187 Mass. 250), 306.
12. **Murder — great bodily harm.]** If men board a railway train, draw deadly weapons on a passenger, rob him, and by threats, intimidation and command cause him to jump from the train while it is in motion, and he is thereby killed, it is murder. *Adams v. People* (100 Ill. 444), 617.
13. **Selling intoxicating liquors — club.]** A private club owning intoxicating liquors and employing one of its members as a steward, paying him for his services and for the use of a room where the liquors are kept, the steward delivering the liquor to other members on checks which he has previously sold them, and the money for which he uses in buying liquors in the name of the club, the steward may not be convicted of keeping intoxicating liquors with intent to sell them. *Commonwealth v. Pumphret* (187 Mass. 564), 340.

CUSTOM.

See CRIMINAL LAW, 129.

DAMAGES.

1. **Exemplary.]** To warrant exemplary damages there must be an element of fraud, malice, evil intent or oppression forming part of the wrongful act.

DAMAGES — *Continued.*

Deliberation and force will not supply it. *Philadelphia, etc., R. Co. v. Hoeflich* (62 Md. 800), 228.

2. **Proximate cause.**] Where a railway company carried a passenger past his destination, and put him off at a water tank, in inclement weather, and he contracted pneumonia in consequence of the exposure, *held*, that the pain, expense and business detriment resulting therefrom were proper items of damage. *International, etc., R. Co. v. Terry* (62 Tex. 880), 529.
3. **Remote — profits.**] On a claim of damage for failure properly to adjust a raker to a reaping machine, according to contract, damages for loss of part of the crop thereby are not recoverable. *Fuller v. Curtis* (100 Ind. 237), 786.
4. **Wealth of defendant.**] In an action of assault and battery, it is improper to consider the defendant's financial means and public position on the question of compensatory damages. *Hare v. Marsh* (61 Wis. 435), 141.

See EVIDENCE, 148.

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See CRIMINAL LAW, 853; EVIDENCE, 519; INSURANCE, 769.

DEED.

Delivery by recording.] The grantor's recording of a deed expressing the receipt of the purchase-money is *prima facie* a valid delivery. *Burke v. Adams* (80 Mo. 504), 510.

See BANKS, 805; INFANCY, 99; TRUST, 536.

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See ADOPTION, 788.

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See BANK, 805; NEGOTIABLE INSTRUMENT, 816.

EJECTMENT.

For street.] *See* MUNICIPAL CORPORATION, 149.

EMINENT DOMAIN.

See MUNICIPAL CORPORATION, 834.

ESTOPPEL.

See CONTRACT, 157; SET-OFF, 739.

EVIDENCE.

1. **Declarations — res gestæ.**] A child died, as alleged, from an injury by a bolt carelessly left projecting from the curb of a city sidewalk. Immediately after the injury he told his mother the cause of the injury, weeping from pain at the time, and the next day he told his father. In an action for damages against the city by the father, the father testified to the son's declaration to him, and that he and the son together went to see the bolt in consequence of the son's declaration, and found drops of blood on it; *Held*, that the declaration to the mother was competent, but that to the father incompetent. *City of Galveston v. Barbour* (62 Tex. 172), 519.
2. **Expert — experiments with guns.**] On a murder trial, evidence of experiments on targets by non-professional witnesses is incompetent to show that the deceased was killed by the close discharge of a gun. *State v. Justus* (11 Oreg. 178), 470.
3. **Hallucinations — impeachment.**] On the trial of a complaint for indecent assault upon a woman in disordered health, it is proper to show that such persons are subject to hallucinations, and to ask her if she had not made similar charges before, without mentioning the one in question; but not proper to ask her if she had not been undergoing medical treatment at a college in presence of a class, nor to show that the defendant had improperly approached the judge or been charged with buying votes. *Darwin v. Parsons* (52 Mich. 425), 262.
4. **Impeachment — cross-examination.**] On a criminal trial the State had introduced evidence impeaching the general moral character of the defendant's witness, Lee. The defendant introduced a witness, Stapp, who swore that Lee's reputation for truth and veracity was good. *Held*, that the State might on cross-examination of Stapp show that Lee had been reputed to have been arrested for felony. *Wachtstetter v. State* (99 Ind. 290), 94.
5. **Negligence — subsequent state of street.**] In an action against a city for a personal injury sustained by falling on an icy sidewalk, evidence is competent to show the like condition of the sidewalk seventeen days later, and the height, slope and surface thereof, and twenty-five feet distant, there being no evidence of any intermediate change. *Berrenborg v. City of Boston* (187 Mass. 231), 296.
6. **Of character of plaintiff in malicious prosecution.**] In an action for malicious prosecution, evidence of the plaintiff's good character is admissible on the question of probable cause. *Woodworth v. Mills* (61 Wis. 44), 185.
7. **Of dead witness — subsequent contradictory statements.**] Where the testimony of a deceased witness is reproduced, it is not competent to show that he had confessed that his evidence was false. *Craft v. Commonwealth* (81 Ky. 250), 160.
8. **Of defendant's wealth — reputation.**] On the question of punitive dam-

EVIDENCE — *Continued.*

ages, in assault and battery, the defendant's wealth may be proved by evidence of reputation. *Draper v. Baker* (61 Wis. 450), 148.

9. *One's own physical suffering.*] In an action for personal injuries, the plaintiff may testify to his pain and internal condition, perceptible to his senses. *Wright v. City of Fort Howard* (60 Wis. 119), 350.

10. *Personal examination of party.*] In an action for personal injuries, the court may at the trial compel the plaintiff to submit to a surgical examination. *White v. Milwaukee City Railway Co.* (61 Wis. 536), 154.

11. *Rebutting infamy.*] To rebut evidence of a witness' conviction of crime his present character and reputation for truth may be shown, but not his innocence of the crime. *Gertz v. Fitchburg R. Co.* (187 Mass. 77), 285.

Burden of proof.] See NEGLIGENCE, 24.

Of financial condition.] See DAMAGES, 141.

Of subsequent precautions.] See NEGLIGENCE, 47.

See CRIMINAL LAW, 211, 583; FACTOR, 378; INSURANCE, 709.

EXECUTOR.

Evidence—trust.] A bond and mortgage were executed to defendant and M., as executors, for \$8,000. Of this amount \$6,000 belonged to the estate and the balance was lent to M. by the plaintiff. In an action to enforce a trust in the bond and mortgage for the plaintiff's loan, declarations of M., made soon after the loan, when she was feeble and expecting soon to die, to the effect that she had received the loan and that the plaintiff was to have an interest in the mortgage as security, and that she intended to execute a written acknowledgment to that effect, *held*, competent and constituting a valid and enforceable declaration of trust. *Barry v. Lambert* (98 N. Y. 390), 677.

EXTRADITION.

1. *Inter-State—detention for another crime.*] In the absence of compact between the States, a fugitive extradited for one crime, may, after discharge and before he is allowed to return, be arrested and tried for another crime. *State v. Stewart* (60 Wis. 587), 388.

2. *"Crime."* False pretenses is a "crime." *Id.*

FACTOR.

1. *Lien—evidence.*] A factor has no lien on the goods of the principal when the balance of account is against the factor, and the factor's advances will be presumed to have been in liquidation of such balance. *McGraft v. Rugee* (60 Wis. 406), 378.

2. *Burden of proof.*] If a factor asserts that a balance against him is due to losses for which he is not responsible, the burden of proof is on him. *Id.*

FALSE PRETENSES.

See EXTRADITION.

FRAUD.

1. Constructive — attorney and client.] The facts that a party to a contract is an attorney, and offers to and does draw the necessary writings gratuitously, do not establish the relation of attorney and client, nor raise the presumption of fraud or undue influence. *Stout v. Smith*, (96 N. Y. 25), 632.
2. Corporation — publication by bank directors.] The publication by savings bank directors, that directors and stockholders are personally responsible for its debts, does not constitute a contract with depositors, but if intentionally false, affords the basis of an action for deceit. *Westervelt v. Demarest* (46 N. J. Law, 87), 400.
3. Representation by director of solvency of bank.] Where a depositor in a savings bank sues a director for deceit in representing that the bank was solvent and that it could not be insolvent without his knowledge, as he was on the finance committee, there can be no recovery, unless there was a fraudulent purpose to deceive, and that is a question of fact. *Cowley v. Smyth* (46 N. J. Law, 380), 432.
4. Representation of solvency — concealment.] A person desiring credit being asked "how he stood," correctly stated his means, but was silent as to the fact that he owed two-thirds as much as his capital. Held, fraudulent. *Newell v. Randall* (82 Minn. 171), 562.

See INSURANCE, 779.

GARNISHMENT.

1. Corporation.] Where garnishment process is served upon one agent of a corporation while the property is in the actual possession of another agent, if the latter delivers the property to one authorized to receive it before the officer served can with reasonable diligence notify the other, the corporation is not liable. *Bates v. Chicago, etc., Railway Co.* (60 Wis. 206), 369.
- Property outside the State may not be garnished. *Id.*
- common carrier.] *It seems*, a common carrier is not subject to garnishment for goods in actual transit at the time of service of process. *Id.*

GAS COMPANY.

See CORPORATION, 266.

GIFT.

- Causa mortis*—symbolical delivery.] The delivery to the donee of the key of the donor's desk in which she kept her papers, and of a descriptive list taken by her therefrom of notes and bonds in the hands of her agent, accompanied by words of gift, constitutes a good symbolical delivery. *causa mortis*, of such notes and bonds. *Stephenson's Administrator v. King* (81 Ky. 425), 172.

GUARANTY.

Notice of default.] A guarantor of a lease is entitled to notice of default, but this is not a condition precedent to an action upon the guaranty, and the failure to give it discharges only to the extent of damage suffered in consequence, and must be pleaded. *Ward v. Wilson* (100 Ind. 52), 768.

GUARDIAN AND WARD.

1. **Allowance for expenses without order.]** A guardian or parent may be reimbursed for necessary expenses incurred in the support of a ward and child, before any order is made therefor by the court, and before the appointment of the guardian. *In re Besondy* (82 Minn. 885), 579.
2. **Ratification.]** Where a ward, after majority, without fraud or undue influence, executes to his late guardian a receipt for the value of property obtained by him from the guardian during minority under a voidable contract, this is a ratification, although he was ignorant that he might disaffirm. *Clark v. Van Court* (100 Ind. 118), 774.

IMPEACHMENT.

See EVIDENCE, 94, 262.

INDECENCY.

See CRIMINAL LAW, 897.

INFANCY.

Deed—delivery by husband—ratification.] If an infant wife with her husband executes and acknowledges a deed of her land, and authorizes him to deliver it, and he delivers it after she comes of age, without objection by her, and she says she is satisfied with the consideration, she is bound. *Sims v. Smith* (99 Ind. 439), 99.

See NEGLIGENCE, 198, 295; *PARENT AND CHILD*, 724.

INJUNCTION.

Laches.] Where the owner of a water-power suffers a city to erect water-works designed to be fed from the same stream, without objection and without the assessment and pre-payment of his damages, he may not have an injunction against their use, on the ground of injury to his water-power. *City of Logansport v. Uhl* (99 Ind. 581), 109.

INSURANCE.

1. **Evidence of physician.]** In an action on a life insurance policy, the prohibition of testimony by physicians as to attendance on the insured before the application may be waived by the beneficiary, but the waiver as to one does not prevent his asserting the privilege as to others. *Penn. Mut. Life Ins. Co. v. Wiler* (100 Ind. 92), 739.
2. **Declarations.]** The declarations of the insured, made sometime before the application, and not part of the *res gestæ* of acts or facts showing disease, are incompetent against the beneficiary. *Id.*

INSURANCE — *Continued.*

3. *Limitation — "loss occurred."*] A fire insurance policy provided that losses should be paid in sixty days from receipt of proofs, and that no suit should be maintainable unless brought within twelve months after the loss occurred. *Held*, that the twelve months must be reckoned from the day of the fire. *Chambers v. Atlas Insurance Co.* (51 Conn. 17), 1.
4. *Settlement by company's fraud.*] Where a life insurance company, by its agent, fraudulently represents to the executor of the insured, whose mental faculties are impaired, that it has discovered evidence sufficient to avoid the policy, and will contest and defeat it, and thus procures a settlement for a sum grossly inadequate, the settlement may be set aside and the balance due recovered. *McLean v. Equitable Life Assurance Society of the United States* (100 Ind. 127), 779.

See AGENCY, 20.

INTENT.

See CONVERSION, 345.

INTOXICATING LIQUORS.

See CRIMINAL LAW, 840.

JURISDICTION.

See CRIMINAL LAW, 631; NEGLIGENCE, 631; STATUTE, 633.

JURY.

Waiver.] *See* CRIMINAL LAW, 741.

LACHES.

As to divorce.] *See* MARRIAGE, 247.

See INJUNCTION, 109.

LANDLORD AND TENANT.

1. *Implied warranty.*] On a lease of a building for exhibition purposes, the galleries being designed only for a limited number of spectators, there is no implied warranty that they shall be safe for a turbulent crowd. *Edwards v. New York, etc., Railroad Co.* (98 N. Y. 245), 659.
2. *Lease of upper story — destruction by fire.*] In the case of the lease of a single room in a building, the destruction of the building by fire releases the tenant from his obligation to pay rent. *Harrington v. Watson* (11 Oreg. 143), 465.

LARCENY.

See CRIMINAL LAW, 130, 123, 126.

LEASE.

See LANDLORD AND TENANT; STATUTE OF FRAUDS, 265.

LETTER.

See CONTRACT, 752.

LIBEL AND SLANDER.

1. **Privileged communication — to Masonic lodge.]** The defendant made an affidavit that the plaintiff, who had testified on a trial before a masonic lodge, was not to be believed on oath. This was at the request of the party on trial. Neither party to this action was a mason. *Held*, not privileged. *Nix v. Caldwell* (81 Ky. 298), 168.
2. **— petition for removal of attorney.]** The publication in a newspaper of the contents of a petition for the disbarment of an attorney, filed in vacation and not presented or docketed, is not privileged. *Cowley v. Pulsifer* (187 Mass. 892), 818.
3. **Words not actionable.]** A written allegation that the plaintiff was supervising architect of a building, and promised and gave to the defendants work on it, for a commission paid him by them, is not actionable in itself. *Logg v. Dunleavy* (80 Mo. 558), 512.

LICENSE.

See NEGLIGENCE, 788 ; STATUTE OF FRAUDS, 203.

LOTTERY.

See CRIMINAL LAW, 306.

MALICIOUS PROSECUTION.

Probable cause — disagreement of jury.] In an action for malicious prosecution, the disagreement of the jury upon a criminal prosecution is *prima facie* evidence of probable cause. *Johnson v. Miller* (63 Iowa, 639), 758.

See EVIDENCE, 135.

MANDAMUS.

To compel levy.] Mandamus does not lie to compel a sheriff to levy. *Habersham v. Sears* (11 Oreg. 431), 481.

MARRIAGE.

1. **Divorce — single act of cruelty — charge of unchastity.]** Where a husband falsely accuses his wife of unchastity she may have an absolute divorce as for cruel treatment. *Bahn v. Bahn* (62 Tex. 518), 539.
2. **— in another State — laches.]** A temporary residence in another State for the mere purpose of getting a divorce does not give jurisdiction but acquiescence for eighteen years is fatal to the wife's assertion of claim for support. *Reed v. Reed* (51 Mich. 117), 247.
3. **Husband's liability for counsel fees in wife's divorce suit.]** A widow may not maintain an action against her husband's administrator for fees charged by her counsel for conducting her suit of divorce, pending which

MARRIAGE — *Continued.*

the husband died ; but the counsel may maintain such action on affirmative proof that the divorce suit was justifiable. *McCherley v. Stockbridge Handy v. Stockbridge* (62 Md. 423), 229.

4. **Legitimacy — wife as a witness — proof of husband's non-access.]** A wife may not testify, on a question of the legitimacy of her children, to facts tending to show non-access of the husband. *Mink v. State* (60 Wis. 583), 386.

See CONSTITUTIONAL LAW, 499.

MASTER AND SERVANT.

1. **Contractor — negligence.]** A contractor agreed with trustees of an estate to take down a building for them, carefully, and under their direction and subject to their approval. *Held*, that defendants were liable for injury to a third person by the contractor's negligence in the work. *Linnahan v. Rollins* (137 Mass. 123), 287.
2. **Course of employment — tort.]** Where a railroad company employs a detective to arrest and prosecute persons obstructing its track, and he arrests an innocent person, the company is responsible. *Evansville and Terre Haute R. Co. v. McKee* (99 Ind. 519), 102.
3. **Dangerous machinery — evident peril — contributory negligence.]** Although a master may have directed a servant, through his superintendent, to wipe off a machine while in motion, without caution as to the danger of so doing, yet if the danger is apparent and the servant in doing so allows the waste which he is using for the purpose to hang down and be caught in the cog-wheels below, this is fatal contributory negligence. *Atlas Engine Works v. Randall* (100 Ind. 293), 793.
4. **Fellow-servants — mate and master of vessel.]** The master of a vessel and the mate are fellow-servants. *Mathews v. Cass* (61 Wis. 491), 151.
5. **Hiring of team and driver.]** Where the hirer of a team with a dower agrees with the owner that he will temporarily furnish his own driver, the hirer is bound to ordinary care toward the owner, and the driver is his servant. *Hofer v. Dodge* (52 Mich. 372), 256.
6. **Negligence — ice near railway.]** A railway brakeman, suddenly called to supper, by the conductor, slipped on snow and ice accumulated near the station platform, and was injured. *Held*, that the company was not liable. *Piquegno v. Chicago and Grand Trunk R. Co.* (52 Mich. 40), 243.
7. — **course of employment.]** The plaintiff put his mare in the defendant's livery-stable for keeping, instructing a servant of the latter to exercise her, but this was not part of the contract of keeping. The mare died in consequence of immoderate riding by the servant. *Held*, that the defendant was not responsible. *Adams v. Cost* (62 Md. 264), 211.
8. — **new employment — duty to warn.]** The defendant, owner and master of a steam-tug, ordered the cook to go forward and handle the bow-line, and he got entangled in it and was hurt. He was usually employed at the

MASTER AND SERVANT — *Continued.*

stern, and the employment in question was more dangerous, and the defendant did not warn him, but urged him to the duty with an oath. But the plaintiff was nineteen years old, had lived at the sea-shore all his life, and had been to sea three summers, and on the tug four months. *Held*, that a verdict for the defendant must stand. *Williams v. Churchill* (187 Mass. 248), 804.

MILITIA.

See CONSTITUTIONAL LAW, 424.

MISTAKE.

Payment — voluntary — when not recoverable.] The plaintiff pre-paid the defendant for transportation of a pile of bark, which he estimated at sixty cords after allowing three cords for shrinkage. On arrival the bark measured but forty cords, measured in the usual manner at its destination. *Held*, that he could not recover back the excess paid. *Buffalo v. O'Malley* (61 Wis. 255), 187.

MORTGAGE.

1. **Chattel — evidence.]** The record of a bill of sale, apparently absolute, but shown by parol to be a mortgage, is effectual as to third parties as notice of a mortgage. *Nicklin v. Betts Spring Co.* (11 Oreg. 406), 477.
2. **Lien for future advances.]** A mortgage for future advances attaches only from the date of the advances. *Id.*

MUNICIPAL CORPORATION.

1. **Board of health — right of eminent domain.]** In the absence of express statutory authority, the board of health of a town has no right to take possession of a dwelling-house and its furniture without the consent and to the exclusion of the owner and occupant, and use the house as a hospital for a person found therein infected with a contagious disease, and too sick to be removed without danger to his health; and the owner cannot maintain an action against the town for such use and occupation of the house. *Spring v. Inhabitants of Hyde Park* (187 Mass. 554), 334.
2. **Defect in street — dangerous awning.]** A city given by its charter the "care, supervision and control" of its streets, may be liable for an injury to a traveller from an unsafe awning over a sidewalk, although the council has failed to pass any ordinances prohibiting or providing for the abatement of such nuisances. *Bohen v. City of Waseca* (32 Minn. 176), 564.
3. **Ejectment for street.]** A city cannot maintain ejectment for a street, the fee of which it does not own. *City of Racine v. Crotsenberg* (61 Wis. 481), 149.
4. **Icy sidewalk.]** A city is not responsible for an injury by a fall on a sidewalk allowed to remain icy for an unreasonable length of time, unless the ice is uneven or rounded. *Broburg v. City of Des Moines* (63 Iowa, 528), 756.

MUNICIPAL CORPORATION — *Continued.*

5. —.] Where a city sidewalk has become dangerous for travellers by an accumulation of ice, and the city has had ample notice of its condition, and might have rendered it safe by a reasonable expenditure, it is liable for an injury to a traveller by falling thereon, although there was no structural defect in the sidewalk, and the ice was smooth, and the icy condition extended throughout the city. *Cloughessey v. City of Waterbury* (51 Conn. 405), 88.
6. Liability for inadequate water supply.] A city having undertaken to supply water to extinguish fires, and levied a tax to defray the expense, is still not liable to a tax payer whose property has been burned by reason of an inadequate supply of water, although the water-works company has contracted to indemnify the city against all actions for its misfeasance or neglect. *Vanhorn v. City of Des Moines* (63 Iowa, 447), 750.
7. Negligence — fire-works.] A city, authorized to appropriate money to celebrate holidays, and undertaking a display of fire-works exclusively for the amusement of the citizens, is not liable to one injured by such fire-works through the negligence of the city's servants. *Tindley v. City of Salem* (187 Mass. 171), 289.
8. Nuisance — fire — tearing down wooden building.] A city may summarily tear down a wooden structure, erected within designated fire limits, and dangerous on account of fires. *Baumgartner v. Hasty* (100 Ind. 575), 830.
9. Ordinance.] A municipal ordinance, forbidding the running of any steamboat without a spark-arrester, to prevent the escape of sparks "as effectually as the same can be prevented by any means known or in use," is unreasonable. *Atkinson v. Goodrich Transportation Co.* (60 Wis. 141), 353.
10. Sidewalk — contributory negligence.] The plaintiff, lawfully using a street of the defendant, stepped to a hydrant on an adjacent lot, one or two feet from the street line, to get a drink of water, and while standing with one foot on the lot and the other on the street, some roofing, negligently suffered by the defendant to stand upon the adjacent sidewalk, fell on him and injured him. *Held*, that he might recover. *Duffy v. City of Dubuque* (63 Iowa, 171), 743.
11. Surface water.] A city, bringing its streets to grade, and omitting to construct gutters, is not liable, in the absence of negligence, for the overflow of surface water from the street on adjacent lots below grade. *Freiburg v. City of Davenport* (63 Iowa, 119), 737.

MURDER.

See CRIMINAL LAW, 617.

NEGLIGENCE.

1. Burden of proof — runaway horse.] In case of injury by a runaway horse on a highway the burden of proof of negligence is on the plaintiff. *Butten v. Frink* (51 Conn. 342), 24.

NEGLIGENCE — *Continued.*

2. **Concurrent.]** In an action for negligent communication of fire, the concurrent negligence of another is no defense. *Atkinson v. Goodrich Transp. Co.* (60 Wis. 141), 352.
3. **Contributory — driving on street railway.]** It is gross negligence to drive upon a street railway track without looking around, and it is unlawful to drive along such track and willfully obstruct the cars. *Wood v. Detroit City Street Railway Co.* (52 Mich. 402), 239.
4. — **hand out of car window.]** Where a passenger on taking his seat in a street car rested his hand partly outside an open window, and it was immediately struck by some upright sewer planks close to the car, *held*, that the question of contributory negligence was for the jury. *Dahlberg v. Minneapolis Street Railway Company* (82 Minn. 404), 585.
5. — **infant.]** A boy, about nine years old, riding on the runners of sleighs in the streets, suddenly leaving such a sleigh in motion, without looking behind him, within thirty feet of a following horse, and so struck and injured, is guilty of contributory negligence fatal to his recovery of damages. *Messenger v. Dennie* (187 Mass. 197), 295.
6. — **question of law.]** The plaintiff's intestate was killed at a railroad crossing. The highway crossed the track at an acute angle. The deceased was driving a gentle horse, and the condition of the road was such as to prevent fast driving. The night was dark and misty, but plaintiff's own witnesses testified that the head light of the engine could have been seen at a distance much more than sufficient to give warning, and to enable him to escape injury. *Held*, that the plaintiff should have been nonsuited. *Tolman v. Syracuse, etc., Railroad Co.* (98 N. Y. 198), 649.
7. **Dangerous premises — infant trespasser.]** The defendant piled lumber, in a large city, on an unfenced lot which the public were accustomed to cross and children to play upon, in a negligent manner, so that it fell upon and killed a young infant who was playing on the lot near it. *Held*, that a recovery was justifiable. *Bransom's Administrator v. Labrot* (81 Ky. 638), 198.
8. — **license.]** Where one merely suffers others to cross his land, without express or implied permission, he is not bound to keep the premises free from pitfalls or obstructions. *Evansville and Terre Haute Railroad Co. v. Griffin* (100 Ind. 221), 788.
9. **Evidence — subsequent precautions.]** In an action for injury by negligence in not providing safeguards at a point of danger, evidence that the defendant subsequently put safeguards there is not competent. *Nalley v. Hartford Carpet Company* (51 Conn. 524), 47.
10. **Presumption of — carrier.]** In case of collision between cars of a street railway company a presumption of negligence arises. *Smith v. St. Paul City Railway Company* (82 Minn. 1), 550.
11. **Proximate cause.]** Where a child fell into an excavation negligently left open on a public sidewalk, and was hurt by striking upon broken glass

NEGLIGENCE — *Continued.*

at the bottom, *held*, that the defect in the sidewalk was the proximate cause of injury. *City of Galveston v. Posnainsky* (63 Tex. 118), 517.

12. —.] Where a horse is frightened by a moving street car and runs away, and the driver is injured by collision with a dangerous obstruction in the street, the obstruction is the proximate cause. *Campbell v. City of Stillwater* (32 Minn. 306), 567.
13. — fire.] The defendant having accidentally but negligently set his own building on fire, the flames were carried by the wind to the plaintiffs' building and consumed it. *Held*, that defendant was not liable. *Pennsylvania Company v. Whitlock* (99 Ind. 16), 71.
14. — negligence of surgeons.] Where one has been injured by the negligence of another, and uses ordinary care in endeavoring to be healed, and in selecting and employing nurses and surgeons, but owing to the negligence or unskillfulness of the latter the injury is increased, the party causing the original injury will also be responsible for the latter. *Pullman Palace Car Company v. Bluhm* (109 Ill. 20), 601.

See ANIMALS, 226; CARRIER, 12, 183; EVIDENCE, 296; JURISDICTION, 730; MASTER AND SERVANT, 102, 211, 243, 287, 304, 798; MUNICIPAL CORPORATION, 289, 332, 564, 743, 756; RAILROAD, 233, 274; RECEIVER, 445.

NEGOTIABLE INSTRUMENT.

1. Attorney fee.] A stipulation in a note for a reasonable attorney fee in case of proceedings to collect is valid against the maker. *Peyser v. Cole* (11 Oreg. 39), 451.
2. —.] A provision in a promissory note, for the payment of ten per cent attorney's fees for collection, in case the principal and interest are not paid at maturity or before suit, renders it non-negotiable for uncertainty. *First National Bank of Stillwater v. Larsen* (60 Wis. 206), 365.
3. Check — action against drawee.] No action lies in favor of the holder of a check against the drawee before acceptance. *Croveling v. Bloomsbury National Bank* (46 N. J. Law, 255), 417.
4. Draft — assignment.] A sight draft payable to the order of a bank, directing the drawee to charge the amount to a certain account, is negotiable, and does not constitute an assignment of the fund. *Whitney v. Elliot National Bank* (137 Mass. 351), 316.
5. Note on demand — liability of indorser.] The indorser of a note payable on demand at a specified place is not liable until formal demand at that place; such demand may be made at any time; and the statute of limitation does not begin to run until such demand. *Parker v. Stroud* (96 N. Y. 379), 665.
6. Sealed note.] An instrument in the form of a negotiable note, but with the word "[sealed]" (the statutory substitute for a common-law seal), following the maker's signature, is sealed and not negotiable, although it further purports to be "negotiable" and payable at a specified place. *Brown v. Jordhal* (32 Minn. 135), 560.

NEGOTIABLE INSTRUMENT — *Continued.*

7. **Transfer by agent — holding for collection.**] An attorney, holding a note merely for collection, cannot confer title by indorsement in the owner's name and delivery without the owner's consent, even to an innocent purchaser. *Quigley v. Mexico Southern Bank* (90 Mo. 289), 503.
8. **Warehouse receipt.**] In the absence of statute provision a warehouse receipt is not negotiable, and an assignment of it conveys no better title than the assignor had. *Solomon v. Bushnell* (11 Oreg. 277), 475.

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NOTICE.

See GUARANTY, 703.

NUISANCE.

1. *Slaughter-house.*] A slaughter-house near an inhabited locality is *prima facie* a nuisance. *Seifried v. Hays* (81 Ky. 377), 167.
2. *Common injury.*] One who sustains special injury from a nuisance is not debarred from an injunction by the fact that others suffer the like injury. *Id.*
See BOARD OF HEALTH, 8; MUNICIPAL CORPORATION, 890.

OFFICE AND OFFICER.

1. *Action for salary by one not entitled to office.*] One getting possession of a public office forcibly and without authority cannot recover the salary thereof from the public. *Meehan v. Freeholders of Hudson* (46 N. J. Law, 276), 421.
 2. *Vacancy—removal.*] Under a constitutional provision that persons appointed to fill vacancies in office shall hold until the next general election and the qualification of their successors, a board of supervisors may not remove at pleasure one whom they have appointed to fill a vacancy in the office of sheriff. *State v. Chaburn* (68 Iowa, 659), 760.
- Altering salary.*] *See* CONSTITUTIONAL LAW, 705.

See REWARD, 55.

ORDINANCE.

See MUNICIPAL CORPORATION, 853; RAILROAD, 233; TAXATION, 237.

PARENT AND CHILD.

1. *Liability of parent for adult child's necessities.*] A father is not liable for necessities furnished to his adult unmarried daughter, at her request, although she lives with him, and he knows and does not object to the furnishing. *Blachley v. Laba* (68 Iowa, 22), 724.
2. *Ratification of tort.*] A father, knowingly permitting his young children to commit acts on his premises likely to cause injury to travellers passing, is responsible therefor, although he did not by words command such acts; and so his knowledge that they had done such acts on previous occasions may be proved. *Hoverson v. Noker* (60 Wis. 511), 361.

PARTNERSHIP.

1. *Real estate—implied sharing of losses—statute of frauds.*] On a petition averring a joint adventure in real estate, by parol agreement, and that the deeds were to be taken in the name of the plaintiff, and to be held in trust for both parties, "who should have equal interests and share in the common venture," the plaintiff's investment with interest to be first returned to him, *held*, that the parties were partners. *Richards v. Grinnell* (68 Iowa, 44), 737.

PARTNERSHIP — *Continued.*

2. *Sale of entire stock — on Sunday.*] One partner may sell the entire stock of the firm to pay its debts in good faith, and may do it on Sunday, it not being in the usual business of sales, and being a work of necessity. *Schneider v. Sansom* (62 Tex. 201), 531.

PAYMENT.

See MISTAKE, 137 ; STATUTE OF LIMITATIONS, 407.

PHYSICIANS.

See CONSTITUTIONAL LAW, 575.

POWER.

See WILL, 543.

PRESUMPTION.

See NEGLIGENCE, 550.

PRINCIPAL AND SURETY.

See SURETY.

PRIVILEGED COMMUNICATION.

See LIBEL, 163; 318.

PROXIMATE AND REMOTE CAUSE.

See DAMAGES, 529 ; NEGLIGENCE, 71, 517, 567, 601.

RAILROAD.

1. *Duty toward trespasser — ordinance.*] Compliance with a city ordinance requiring that "when a locomotive engine is used within the limits of the city, a man shall ride on the front of the locomotive engine when going forward, and when going backward on the tender, not more than twelve inches from the bed of the road," is not due to persons walking on the private way of the railroad company, at an uninhabited point and not at a street crossing, although in a path used by the public with the silent acquiescence of the company. *Baltimore and Ohio R. Co. v. State* (62 Md. 479), 233.
2. *Negligence — alighting.*] When a railroad train draws up at a platform so that only the forward end of the smoking car is at the platform, a woman passenger in a rear car is not bound to go through the smoking car to alight, nor to alight from the front end of the rear car, and if she is injured in alighting from the rear end, in consequence of the position of the train, the company is liable. *Cartwright v. Chicago and Grand Trunk Railway Company* (52 Mich. 606), 274.
3. *Obstruction of surface water.*] Where a railway embankment obstructs and turns the surface water on to the land of an adjacent owner, through

RAILROAD — *Continued.*

whose premises the railway goes, the owner may recover damages therefor, although he has received compensation for the taking of the land for the right of way. *Drake v. Chicago, etc., R. Co.* (63 Iowa, 302), 746.
See CARRIER, 307, 525, 583, 605; CONSTITUTIONAL LAW, 619; MASTER AND SERVANT, 243; NEGLIGENCE, 585, 649.

RATIFICATION.

Of tort.] *See* PARENT AND CHILD, 381.

RECEIVER.

Liability to suit.] The receiver of an insolvent railroad company is liable to an action for the negligence of his agents in operating the road. *Little v. Dusenberry* (46 N. J. Law, 614), 445.

RECITAL.

In deed.] *See* STATUTE OF LIMITATIONS, 657.

RECORDING.

See DEED, 510.

RELIGIOUS SOCIETY.

Expulsion.] A by-law of a religious society provided that any member should be dropped from the list who had ceased to worship regularly with the society or had failed to contribute to the support of its worship for one year. *Held*, that a member could only be expelled by a vote of the society, after a hearing. *Gray v. Christian Society* (187 Mass. 329), 810.
See STATUTE, 148.

REPLEVIN.

See CORPORATION, 131.

RESTRAINT OF TRADE.

See CONSTITUTIONAL LAW, 610, 636; CONTRACT, 240.

REWARD.

Claimed by public officer.] A public officer, whose compensation is fixed by law, cannot recover a reward for services rendered within the scope of his official duties. *Matter of Russell* (51 Conn. 577), 55.

RIVERS.

Boom company.] *See* CONSTITUTIONAL LAW, 590.

SET-OFF.

Estoppel.] An obligor may plead a set-off, although has given a bond to secure the payment of the cause of action, not reserving the right of set-off. *Van Sandt v. Dows* (63 Iowa, 594), 759.

SHERIFF.

See MANDAMUS, 481.

SHIP AND SHIPPING.

General average — fire in vessel at wharf, extinguished by city authorities.]

If a fire in a vessel at a city wharf is extinguished by the city fire department, acting under municipal authority and not at the request or direction of the shipmaster, the cargo saved is not liable to contribute to a general average loss. *Wamsutta Mills v. Old Colony Steamboat Co.* (187 Mass. 471), 825.

See MASTER AND SERVANT, 151.

SIDEWALKS.

See MUNICIPAL CORPORATION, 88.

SLAUGHTER-HOUSE.

See NUISANCE, 167.

STATUTE.

1. "Charitable corporation" — religious society.] A religious society is not a "charitable corporation." *De Wolf v. Lawson* (61 Wis. 469), 148.
2. Construction — "mortgage."] A statute authorizing a court to order the renting, sale or other disposal of the real and personal property of minors, does not empower such court to authorize a guardian to mortgage his ward's real estate. *Trutch v. Bunnell* (11 Oreg. 58), 456.
3. Extra-territorial force.] An action of damages for death caused by negligence in another State cannot be maintained in this State without proof of the existence of a like statute in that State. *Debevoise v. New York, etc., R. Co.* (98 N. Y. 377), 638.
4. —. An action may be maintained in Iowa against a railroad company for negligently killing a mule in Illinois, the remedy being granted by the statutes of both States. *Boyce v. Wabash Railway Co.* (68 Iowa, 70), 730.
5. "Residence" — domicile.] Where one rents and keeps a house with his family in one county, designing to remain until he has completed a certain job, he becomes an "actual resident" there, although he has a domicile in another county, whither he intends to return on the completion of the job. *Fitzgerald v. Arel* (68 Iowa, 104), 733.
6. "Trustee of express trust" — consignee.] One described in a contract of carriage as consignor, consignee and sole owner, is "a trustee of an express trust" within the statute of parties, and may maintain an action to recover overcharges paid. *Waterman v. Chicago, Milwaukee and St. Paul Railway Co.* (61 Wis. 464.), 145.

STATUTE OF FRAUDS.

1. **Agreement for lease.]** An oral agreement for a lease for a year, to commence in the future, is valid. *Whiting v. Ohlert* (53 Mich. 462), 265.
2. **Debtor placing property in hands of another.]** The plaintiff in foreclosure adjourned the sale at the request of a third person, who represented that he had received property from the mortgagor to enable him to pay, or to indemnify him for paying the debt, and who orally promised to pay the debt or to bid off the property at the adjourned day for enough to pay the debt. *Held*, that the promise was void under the statute of frauds for want of consideration. *Ackley v. Parmenter* (98 N. Y. 435), 698.
3. **Void sale valid as license.]** An oral sale of stumpage, void within the statute of frauds, may be valid as a license. *Spalding v. Archibald* (52 Mich. 865), 253.

See PARTNERSHIP, 727.

STATUTE OF LIMITATIONS.

1. **Acknowledgment to stranger — recital in deed.]** A father conveyed his land to his sons by a deed declaring that the land to be subject to and charged with the payment of certain notes made by him, forming part of the consideration, and assumed by the grantee. *Held*, a sufficient acknowledgment to take the notes out of the statute of limitations. *DeFrest v. Warner* (98 N. Y. 217), 657.
2. **Joint promisors — new promise.]** A joint promisor wrote the promisee that it would be impossible for him to pay the note at present, and asked indulgence until he or the other maker or both should be in better condition to liquidate it. *Held*, a conditional promise to pay when able, not available to the promisee without affirmative proof of the fulfillment of the condition. *Parker v. Butterworth* (48 N. J. Law, 244), 407.
3. **Payment.]** A payment by one joint promisor will not remove the completed bar of the statute of limitations as to another. *Id.*

See VENDOR AND PURCHASER, 161.

STOCK.

See CORPORATION, 181.

STREET.

Ejectment for.] *See* MUNICIPAL CORPORATION, 149.

SURETY.

1. **Contribution.]** One surety, paying the whole obligation after judgment, may compel contribution from his co-surety for the costs, although the latter was not served with process. *Van Winkle v. Johnson* (11 Oreg. 469), 495.
2. **For faithful performance — new duties.]** The defendant became surety for the faithful performance of a book-keeper's duties in the department

SURETY — Continued.

of docks in the city of New York. The book-keeper was required also to assist the treasurer in receiving and depositing the department funds, and he embezzled the same by means of false entries or omissions to make entries. It was conceded that the additional duties did not hinder his faithful performance of the duties of book-keeper. *Held*, that the question of damages was for the jury. *Mayor, etc. v. Kelly* (98 N. Y. 467), 689.

SUNDAY.

See PARTNERSHIP, 521

SURFACE WATER.

See WATER AND WATER-COURSE, 627.

TACKING.

See ADVERSE POSSESSION, 199.

TAXATION.

1. **Mortgages — place — impairing contract.]** Mortgages of non-residents may be taxed where recorded without regard to the time of the execution of the contract. *Mumford v. Sewall* (11 Oreg. 67), 462.
2. **Ordinance — “machinery.”]** Gasometers and gas mains and pipes of a gas company are not part of its “machinery actually used in the manufacture” of gas. *Consolidated Gas Company v. Mayor, etc., of Baltimore* (62 Md. 588), 287.

TRESPASS.

Actions for joint — satisfaction.] In case of a joint trespass there may be separate actions, and satisfaction of the separate costs, but only one satisfaction of damages. *Lord v. Tiffany* (98 N. Y. 412), 689.

TRIAL.

See EVIDENCE, 104.

TRUST.

Absolute deed — promise to re-convey.] A deed of mortgaged lands was executed by the mortgagor, husband and wife, to the mortgagee, upon the mortgagee's oral promise to the wife to sell the land, discharge the debt, and pay back the surplus or re-convey any portion unsold. *Held*, a valid and enforceable trust in equity. *Clark v. Haney* (62 Tex. 511), 536.

See EXECUTOR, 677; WILL, 29, 219.

VENDOR AND PURCHASER.

Vendor's lien — statute of limitations.] As against a remote vendee, a vendor's lien upon land does not subsist after the statute of limitations has run against a note given for the purchase money, and the first vendee cannot extend the lien by payments upon the note. *Tate v. Hawkins* (81 Ky. 577), 181.

WAREHOUSEMAN.

See NEGOTIABLE INSTRUMENT, 473.

WARRANTY.

See LANDLORD AND TENANT, 639.

WATER AND WATER-COURSE.

Surface water — pond drainage.] The owner of upper land, on which there is a pond fed only by surface water, when good husbandry requires it, may drain the same by an artificial drain into its accustomed outlet or natural drain, notwithstanding the flow over the land of a lower proprietor may thereby be increased. *Peck v. Herrington* (109 Ill. 611), 637.

See MUNICIPAL CORPORATION, 737 ; RAILROAD, 746.

WILL.

1. **Cancellation.]** A will was wholly written on the first page of a double sheet. On the fourth page the testator wrote in pencil, "I revoke this will," and signed and dated it. This was not attested. *Held*, not a revocation, within a statute prescribing burning, tearing, cancelling, obliterating, or making a new will or codicil, or some other writing signed, attested and subscribed like a will, as the only modes of revocation. *Will of Ladd* (60 Wis. 187), 855.
2. **Charitable trust — certainty.]** A will provided a devise and bequest to the city of Baltimore in trust for the "McDonogh Educational Fund and Institute." There was no such corporation, but there was an organization under an ordinance of the city of Baltimore, called "Board of Trustees of the McDonogh Educational Fund and Institute," and supported by funds from McDonogh's estate, which carried on a "School Farm" known as the "McDonogh Institute." *Held*, that the trust was sufficiently certain and was valid. *Barnum v. Mayor, etc., of Baltimore* (62 Md. 275), 219.
3. **—.]** A bequest for a charitable institution to be incorporated by the name of the Smith Memorial Home, for aged, respectable, indigent women who have been residents of New London, is valid. *Cott v. Comstock* (51 Conn. 352), 29.
4. **—.** A bequest for permanently keeping burial lots in order and for maintaining religious services is void as to the former. *Id.*
5. **Power — "sell, exchange and dispose."] Authority** in the executor of a will to manage and control the estate in his discretion, and "sell, exchange and dispose" of it, includes the power to mortgage. *Faulk v. Dashiell* (82 Tex. 642), 542.
6. **Rule in Shelley's case.] A devise of the rents and profits of lands to M.** until his youngest child shall become of age, "upon the happening of which event the fee-simple of said lands shall then vest absolutely in said M. and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest," vests in M. an estate in fee-sim-

WILL — *Continued.*

ple when his youngest child reaches majority, there being nothing in the context or circumstances plainly showing a different intention. *Shimer v. Mann* (99 Ind. 190), 82.

WITNESS.

Evidence of dead.] *See* EVIDENCE, 160.

Infamy.] *See* EVIDENCE, 235.

Wife as.] *See* MARRIAGE, 386.

WORDS.

"Charitable corporation."] *See* STATUTE, 148.

"Debt."] *See* CORPORATION, 328.

"Loss occurred."] *See* INSURANCE, 1.

"Machinery."] *See* TAXATION, 237.

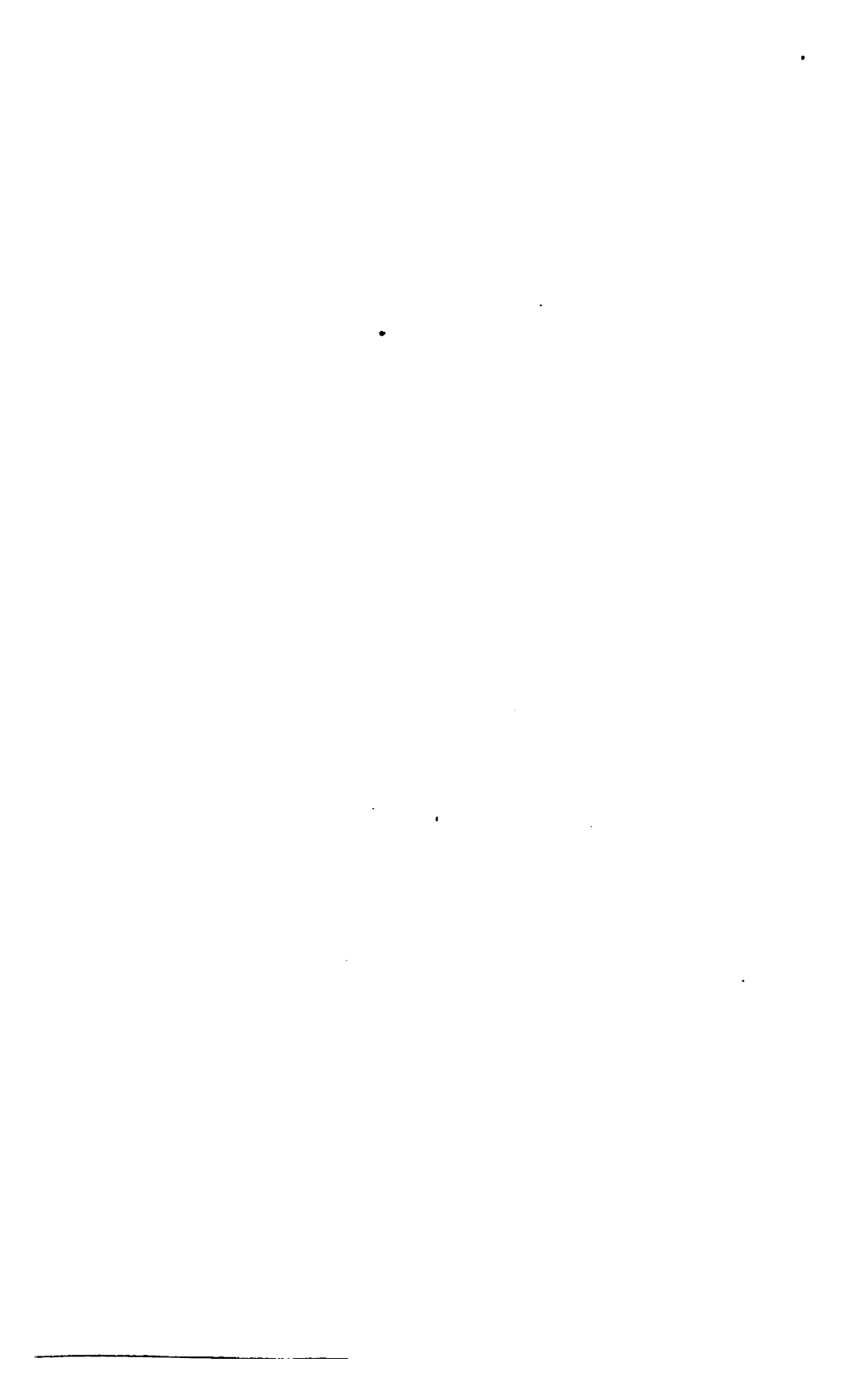
"Middle of channel."] *See* BOUNDARY, 16.

"Mortgage."] *See* STATUTE, 456.

"Residence."] *See* STATUTE, 733.

"Trustee of express trust."] *See* STATUTE, 148.

"Vicinity."] *See* CONTRACT, 240.



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